

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 913 of 1999

And

CONFIRMATION CASE NO.1 OF 1999

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

and

Hon'ble MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : YES
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

TRIKAMBHAI @ TIKO RAVAJIBHAI THAKOR

Versus

STATE OF GUJARAT

Appearance:

MR DEEPAK M SHAH for appellant

Mr.P.G.Desai, learned PUBLIC PROSECUTOR
for State of Gujarat

CORAM : MR.JUSTICE M.R.CALLA

and

MR.JUSTICE R.R.TRIPATHI

Date of decision: 10/05/2000

1. The judgment and order of conviction and sentence passed by the learned Addl.Sessions Judge at Nadiad in Sessions Case No.95 of 1999 dated 25.8.99 is the subject matter of challenge in the Criminal Appeal No.913 of 1999 (through jail) at the instance of appellant Trikambhai alias Tiko Ravjibhai Thakor and in confirmation Case No.1 of 1999 the confirmation of death sentence under sub-section (1) of S.366 of Cr.P.P. awarded to the accused appellant, namely, Trikambhai alias Tiko Ravjibhai Thakor is to be considered.

2. The appellant was tried for the offences punishable under Sections 363, 376(2)(F), 451, 302 and 201 of I.P.C. in Sessions Case No.95 of 1999 before the learned Addl. Sessions Judge at Nadiad. The appellant was found to be guilty for the offences punishable under Sections 302, 376(2)(f), 363 and 451 of I.P.C. and was convicted accordingly but was acquitted of the offence punishable under S.201 of I.P.C. After giving the judgment under S.235(1) of Cr.P.C. and after hearing the appellant on the question of sentence under S.235(2) of Cr.P.C. the trial Court passed the following order:-

"ORDER

Under the provision of Sec.235(2) of Code of Criminal Procedure, and subject to confirmation of Hon'ble Gujarat High Court under Sec.28(2) of the Cri.P.Code, for the offence punishable under S.302 of I.P.C., the accused is hereby awarded the sentence of death, and also ordered to pay fine of Rs.5000/- (Rupees five Thousand Only) in default, two years rigorous imprisonment.

For the offence punishable under Sec.376(2)(F) of IPC., the accused is ordered to suffer life imprisonment and also to pay fine of Rs.5000/- (Rupees Five Thousand Only) in default, two years rigorous imprisonment.

For the offence punishable under Sec.363 of IPC., the accused is awarded rigorous imprisonment of 7 years and to pay fine of Rs.5000/- (Rupees Five Thousand Only) in default, one year rigorous imprisonment.

For the offence punishable under Sec.451 of IPC., the accused is awarded rigorous imprisonment of 2 years, and to pay fine of Rs.2000/- (Rupees Two Thousand Only) in default, six months rigorous imprisonment.

Set off against the sentence of imprisonment be given to the accused for the period of detention

undergone by him under Sec.428 of Cr.P.Code.

All the sentences of imprisonment shall run concurrently.

The matter alongwith R & P be immediately referred to the Hon'ble Gujarat High Court for confirmation of sentence of death under Sec.28(2) of Cr.P.Code.

The muddamal is ordered to be destroyed after appeal period.

Copy of the judgment and the order be given to the accused under Sec.363 of Cr.P.Code."

3. Briefly stated, the case of the prosecution is that on 5.1.99 one Shri Mahijibhai Ambalal Thakor, resident of Indira colony, village Lakkadpura, District Kheda went to the house of one Shri Kalidas Vitthalbhai Thakor with his wife at about 9.30 P.M. to watch T.V.Serial 'Om Namaha Shivaya", leaving their daughters namely, Ramila and Jagruti sleeping at their residence. The house of Shri Kalidas Vitthalbhai Thakor is situated just opposite to the house of said Shri Mahijibhai. At about 10.00 P.M. the youngest daughter, namely, Jagruti cried and, therefore, wife of Mahijibhai returned to her house and came back to the house of Kalidas Vitthalbhai Thakor alongwith Jagruti leaving Ramila alone in the house. When the T.V.Serial was over said Shri Mahijibhai alongwith his wife returned to their house and to their dismay they found that their daughter Ramila, aged 5 years, was not there. A search was made in the nearby area, in other villages Simarda, Rupiyapura, Dantali but Ramila could not be found. On 6.1.99 said Shri Mahijibhai lodged a complaint before Petlad Town Police Station about his missing daughter Ramila. The dead body of Ramila with injuries was then found in the sim of Vaniyavali Nali on 6.1.99 itself. Petlad Town Police Station therefore undertook an inquiry under accidental death case registered at No.2 of 1999. Inquest Panchanama was drawn and the dead body of Ramila, as was recovered, was sent to the Medical Officer, SSG Hospital, Petlad for post mortem. The Panchanama of the scene of the offence was prepared and the statements of certain witnesses were recorded. After the receipt of the post mortem note, it was revealed that the death of Ramila was homicidal death and, therefore, the complaint was lodged by the Police Inspector Shri Madhavsinh Pahadsinh Vasava and the case was accordingly registered for the offences. The statements of some more witnesses were

recorded and on 8.1.99 the dog squad was called and dog tracking was made. The dog jumped at the accused appellant standing in a crowd and, therefore, the accused appellant was arrested on 8.1.99. The Panchanama with regard to the places shown by the accused was made, the muddamal pant, shirt, etc. shown by the accused were seized and the muddamal shown by the accused and seized at the time of drawing the panchanama of the scene of offence were sent to the Forensic Science Laboratory at Ahmedabad for examination. The accused was medically examined and the F.S.L. reports were collected along with the Map and kept with investigation papers. As it was revealed that the girl was also raped, the charge-sheet was filed accordingly against the accused in the Court of Judicial Magistrate, First Class, Petlad. The learned Judicial Magistrate, First Class, Petlad committed the case to the Court of Sessions where from it was transferred to the Court of Addl. Sessions Judge at Nadiad for trial and disposal according to law. The charges were framed as per Exh.4 dt.12.7.99 for offences punishable under Sections 302, 376(2)(F), 363, 451 and 201 I.P.C., the accused pleaded not guilty and demanded trial.

4. The prosecution examined 13 witnesses in all. There is no eye witness but the prosecution sought its case to be proved on the basis of the circumstantial evidence in the form of the accused being last seen with the victim i.e. deceased Ramila, aged 5 years, other witnesses, stating the circumstances against the accused showing his involvement in the commission of the offence including the witnesses, who had associated in the search of Ramila, panch witnesses of scene of offence, panch witness of the panchanama of dog tracking, the police investigation officer, who has referred to inquest report, panchanama of scene of offence, arrest panchanama, dog tracking panchanama, discovery panchanama, report of Radiologist with regard to the age of the accused, F.S.L. reports, map of the scene of the offence, photographs of the dead body of the deceased, the complaint as lodged by Police Inspector Madhavsinh Pahadsinh Vasava, etc. and the two Doctors, who performed the post mortem examination of the dead body of deceased Ramila and also medically examined the accused and gave the certificate. The answers of the accused were recorded under S.313 of Cr.P.C. at Exh.5. Defence of the accused is total denial coupled with the say that he had been falsely involved at the instance of ex Sarpanch Muljibhai. For the purpose of pointed and proper appreciation of the evidence, we may classify the same in the following heads:-

- (i) Evidence that the accused was last seen with the deceased.
- (ii) Oral evidence of victim deceased Ramila's father and other witnesses, who were associated in the search of deceased Ramila and those who have disclosed circumstances against the accused appellant.
- (iii) Evidence of dog tracking.
- (iv) Expert evidence of two Doctors including the answer given by the accused-appellant to P.W.2 admitting his acts in his own words with regard to the offences.
- (v) Evidence of investigation officers, discoveries, panchanamas and the F.S.L. reports about the muddamal recovered from the accused and the scene of offence so as to provide corroboration to the circumstances appearing against the appellant.

A. First of all we may refer to the evidence of P.W.3 Mahijibhai at Exh.16 (page 105 to 114 of the paper book). This witness, aged 33, is the father of deceased Ramila, engaged in the agricultural labour. He says that he has three children, eldest is son Jayesh aged 7 years, who was at village Rupiyapura on the date of incident, his daughter Ramila was about three and half years at the time of incident and the youngest daughter Jagruti was about 1 year at the time of incident. Deceased Ramila was studying in Balmandir. He states that the incident took place on Fifth January 1999. In the evening, after returning from the work, after taking dinner, he alongwith his wife had gone to his relative Kalidasbhai's house to watch the T.V.Serial 'Om Namaha Shivaya'. The house of Kalidas is only about 15 feet away from his house. When they went to the house of Kalidas to watch the T.V.Serial, daughters Ramila and Jagruti had gone to sleep. After the start of the T.V.Serial, daughter Jagruti cried and thereupon his wife brought her and came back to the house of Kalidas while Ramila was still asleep in the house. At about 10 to 10.15 P.M. the Serial was over and when he went back to his house, Ramila was not found. Even after searching her in the nearby and in the whole colony, Ramila was not found, she was also not found at her Mausil i.e. her mother's place. Ramila was not found for the whole night and, therefore, he gave a photo of Ramila to the Police and stated that Ramila was missing. This information was given at Petlad Police Station. It was also stated by him before the police that in the photograph his daughter was wearing a sweater of blue colour (in Gujarati the word "Bhoora " is used for blue colour). After informing

the police he came back to the village and on his return (6.1.99) Muljibhai, a resident of village told him that Ramila had been found. He told him that Ramila's body was lying in Vaniyavali Nali and we have to go there after calling the police. They went to the place where Ramila was lying after the Police came. He was made to stand away. Police made some writings there and the dead body was sent to the Hospital. The Police then recorded his statement and, thereafter, on the next day (7.1.99) after the Hospital procedure was over, the dead body was given to him and the finale of the dead body was done. Thereafter, on the next day (8.1.99) Police recorded his further statement and the Police also came to his village for investigation alongwith the dog. The dog was made to smell place where the dead body was lying and thereafter the dog started moving at different places and at last Trikammbhai Ravjibhai (the accused) was caught. Said Trikammbhai Ravjibhai was known to him and that he was living about 4 to 5 houses away from his house, that he and Trikammbhai had no relations of visiting each other's house, that he had no enmity with the appellant or anyone else.

In cross-examination he has stated that he had studied upto IInd standard. There were about 60 houses in Indira colony and all persons belonging to Thakor community are living there. Only two Mohammedans are living there. The house of Kalidas is opposite to his house but his house and the appellant's house are in the same line. Kalidas was his Bhua's son and Ashokbhai Ambalal Thakor was also his Bhua's son, Ambubhai Punjabhai and Champakbhai Gordhanbhai were also his relatives. He says that he had gone to the house of Kalidas on many occasions to watch the T.V. On the date of the incident the Serial had started at 9.30 P.M. and was over at about 10.30 P.M., that at the house of Kalidas he had gone with his wife and, thereafter, his neighbour Ichchaben had also came there. Jagruti had cried after about half an hour of the starting of the Serial and his wife had gone to bring Jagruti. He says that through-out the Serial he was sitting in front and his brother was sitting behind and, therefore, during the period of Serial if any person had gone out or not is not known to him. Since he was watching the T.V. he could not see Kalidas, who was sitting on the bed in the side room. After the T.V. Serial was over he, his wife and brother went to his house and Kalidas remained in his own house. He then states that when he was searching for Ramila, Kalidas had also come and Kalidas had also started searching for Ramila. According to him Kalidas was working as a driver and used to take liquor

occasionally. He says that he does not know as to whether there was any police case against Kalidas. That during the period he was watching the T.V. Serial and till the T.V. Serial was over nothing was talked about Ramila in the house of Kalidas. There were no street lights in Indira colony. There was no street light on the way leading to Nali and on the date of incident, it was winter and chill cold. On the next day he and his brother-in-law had gone to the Police station and no one else was there. They had reached the police Station at about 9.30 A.M. He says that they took about half an hour to inform the police. The dog was brought on 8.1.99. He has denied the suggestion that the dog had caught Punambhai Vaghabhai and Chhaganbhai Mangalbhai. He has denied the suggestion that prior to the date of incident appellant used to come to his house. He has agreed to the suggestion that he had come to know about the offence being committed by the appellant because dog had caught the appellant, but he had no personal knowledge.

(a). From the statements of this witness it is clear that:-

- (i) the incident had taken place on the night of 5.1.99 and after the T.V. Serial was over i.e. 10.30 P.M. when he returned to his house Ramila was not found in the house.
- (ii) While the Serial was going on and till it was over at 10.30 P.M. there was no talk about Ramila and he also does not know as to whether any person had gone out of the house during the period of the Serial or not.
- (iii) Kalidas had also come for the search of Ramila and had started searching her.
- (iv) He does not say anything about Kalidas going out after the Serial was over. On the contrary he says that after the Serial was over he came back to his house and that while he came back to his house after the Serial was over Kalidas remained in his own house.
- (v) He reported to the police at 9.30 A.M. on 6.1.99.
- (vi) After his return from Police Station, through Muljibhai, a resident of his village, he came to know that dead body of Ramila was lying in the Vaniyavali Nali i.e. on 6.1.99.
- (vii) That the appellant did not use to come to his house and that the appellant was living about 4 to 5 houses away from his house in the same line.
- (viii) That Kalidas and Ashokbhai were his Bhua's sons

and Ambubhai Punjabhai and Champakbhai Gordhanbhai were his relatives.

(ix) That his neighbour Ichchaben had also come to watch the T.V.Serial at the house of Kalidas after he had reached there alongwith his wife.

There is nothing to disbelieve this witness and it appears that he has given the correct version of whatever was in his knowledge and there is nothing to disbelieve the version of this witness as given by him right from the time when he went to watch the T.V.Serial on 5.1.99 till 8.1.99 when the dog tracking was conducted by the Police.

B. We may now refer to the evidence of P.W.4 Kalidas Vitthalbhai Thakor Exh.19 (Page 117 to 124 of the paper book). He is the person who lives in the same colony i.e. Indira colony of village Lakkadpura opposite to the house of Mahijibhai i.e. father of the deceased and at whose house Mahijibhai and his wife had gone to watch the T.V.Serial 'Om Namaha Shivaya'. His age is 40 years and occupation is driving. He has deposed in the examination-in-chief that he was at his house in the evening of 5.1.99 i.e. the date on which the incident took place. On that night Mahijibhai alongwith his wife had come to his house to watch the T.V.Serial 'Om Namaha Shivaya', which started at 9.30 P.M. After the T.V.Serial started the younger daughter of Mahijibhai had cried and, therefore, wife of Mahijibhai brought the younger daughter with her and sat in the front. After some time he went to urinate. He says that at that time appellant Trikambhai was standing ahead of Mahijibhai's house with the elder daughter of Mahijibhai, namely, Tapu (Ramila - the deceased). He says that he asked the appellant as to what was he doing and thereupon the appellant replied that since she was crying he was bringing her to her mother. Thereupon he came into his house, but the appellant did not bring Ramila. He also says that thereafter he watched the Serial, Shri Mahijibhai was sitting before the T.V. and he kept sitting behind Mahijibhai. He also says that after the Serial was over he had to go to Ambaji with his taxi and, therefore, he left for Ambaji. On the next day i.e. 6.1.99 he came back from Ambaji at about 8.00 to 8.30 P.M. and by that time Trikambhai i.e. appellant had been arrested with regard to this incident of committing rape by him on the daughter of Mahijibhai.

In cross-examination he has stated that he had driving licence since 1982, the Serial had started at 9.30 P.M. and was over at 10.30 P.M., after about 10

minutes of the starting of the Serial, daughter of Mahijibhai had cried and, therefore, his wife went out, came back with her daughter and about 5 to 10 minutes thereafter he had gone to urinate. On his return after urination, he did not inform Mahijibhai that he had seen the appellant outside and Mahijibhai did not know that he had gone to urinate because Shri Mahijibhai was sitting in the front and he was sitting at the back. After the T.V.Serial was over all had gone to their respective houses and he had left for Ambaji with the vehicle in their presence. He says that at the time when he left for Ambaji he did not know that Ramila was missing. He has also denied the suggestion that at 10.30 P.M. he knew that Ramila was missing. He has also denied the suggestion that he had associated with Mahijibhai on that night in the search of Ramila. He then says that on the evening of next day when he came back from Ambajii his wife had informed about the incident, which took place with Ramila and on that very evening his wife had informed him that the appellant had committed rape upon Ramila, had bitten her and had killed her. He has denied the suggestion that he was in the habit of drinking alcohol, but had admitted that in past a complaint of committing rape had been filed against him. He has admitted that he knows one Rajubhai of his village who sells liquor. He has also denied the suggestion that on the date of the incident he did not go to Ambaji but had gone for drinks at Rajubhai place. He has also denied the suggestion that the appellant was with him for drinks at Rajubhai's place. He has also denied the suggestion that he had not gone to urinate during the Serial, he has also denied the suggestion that he was giving false evidence because he was related to Mahijibhai. He has pleaded no knowledge in answer to the question as to whether the dog, which was brought by the Police, had pointed towards Punambhai Vaghabhai and Chhaganbhai Mangalbhai or not.

(a) If we examine the statements of this witness in the light of the deposition made by P.W.3, namely, Mahijibhai, we find that this witness Kalidas does not find support from P.W.3 on the question that he had left for Ambaji immediately after the T.V.Serial was over and in the presence of the persons, who had come to watch T.V.Serial at his house while the visitors were going back to their houses. This witness is contradicted by the statement of P.W.3 on the question that he did not know about the missing of Ramila and he is also contradicted on the question that he had not made any search on that night for missing Ramila. Besides this, his statement that on the next day i.e. 6.1.99 itself in

the evening when he came back from Ambaji, Trikambhai had already been arrested, is factually incorrect, because it is a matter of record that Trikambhai had been arrested on 8.1.99 and till the evening of 6.1.99 it was not even known that the appellant was the person, who had committed the rape upon the daughter of Mahijibhai. Not only this, he has stated in the cross-examination that in the evening of 6.1.99 when he came back from Ambaji his wife had informed that the appellant had raped Ramila, had bitten her and killed her. This part of his statement is factually incorrect. His wife has not been examined and in the facts of this case, there is no material on record on the basis of which it can be said that the appellant had been apprehended by Police or anyone else on 6.1.99 itself and the fact is that the appellant was apprehended only on 8.1.99 after the dog tracking. Thus, his statement on this aspect of the matter does not inspire any confidence. What has come on record is that as per the information given to P.W.3 i.e. Mahijibhai by Muljibhai that the dead body of Ramila had been found lying at Vaniyavali Nali on 6.1.99 and, therefore, till that time i.e. the evening of 6.1.99 it could not be said by anyone that Ramila had been bitten, raped and killed by the appellant. The appellant was connected with the offence only on 8.1.99.

(b) Apart from it, the conduct of this witness is wholly unnatural inasmuch as he did not inform the father or mother of Ramila on return after urinating that their daughter was with the appellant outside their house. The father of Ramila and this witness are relatives and if he had seen the appellant with Ramila in the cold night and when the appellant had also told him that he was bringing Ramila to her mother because she was crying, it would have been absolutely natural for him to immediately inform the father or mother of Ramila, who were watching T.V.Serial in his house that the appellant was standing with Ramila outside the house but he did not do so. Not only this, he did not even inform them after the T.V. Serial was over as to why the appellant did not come in his house to hand over Ramila to her mother, more particularly when he himself says that the appellant had told him that he was bringing Ramila to her mother because she was crying. This conduct on the part of this witness is wholly unnatural and if P.W.3 is believed, this witness has also belied, for reasons not known, the fact that he had also started searching for Ramila on that very night after the T.V.Serial was over. Thus, this witness cannot be said to be a reliable and dependable witness and his story on the question of the evidence that the appellant was last seen with the deceased is not

at all believable. We, therefore, do not find it safe to rely upon this witness on the question that appellant was last seen with the deceased Ramila on the fateful night.

C. P.W.6 Exh 21, Manishaben, daughter of Ashokbhai, aged 14 years, has been examined to show that on the evening of the date of the incident i.e.5.1.99 the accused appellant was in search of some opportunity to satisfy his sexual urge. This witness has stated that in the evening of 5.1.99 when she and her family members had gone to sleep after taking dinner, accused appellant came to her house and gave a call in her mother's name. She came out and saw the accused appellant standing. She asked him as to what for he had come there and he answered that he had just come and while she was returning, he asked her to stay on. She asked him as to what was the work and then he told, 'would you do my work? She asked him as to what? She again questioned as to what? Then he told that he would give her 50 rupees. Thereupon she told that she would wake up her father and having said so, she came back in the house and gone to sleep and the accused appellant went away. On the next morning she came to know that Mahijibhai's daughter Ramila was missing and then came to know that the dead body had been found and that Police had recorded her statement. In the cross-examination she says that the accused appellant had come to her house on 5.1.99 for the first time, that she was living in the house alongwith her father, mother, younger brother and younger sister and that in the next morning after the night of 5.1.99 she told her father that the accused appellant had come and had offered her 50 rupees and she has agreed to the suggestion that she had disclosed the fact about the offer of 50 rupees for the first time to the police when the police came to record her statement.

(a) Through this witness the prosecution has tried to establish that on the evening of the date of incident, the accused appellant was intent to satisfy his sexual urge and, therefore, made the aforesaid indecent proposal.

(b) The version of this witness does not appear to be natural inasmuch as no person would go to a house in which a family of five persons is living so as to give a call in the night hours in the name of the mother of the witness and then dare to offer 50 rupees to the witness and make any indecent proposal while knowing the fact that she was not living alone in the house and that the girl was living in the house with her parents and more particularly when he had never gone to her house in the

past prior to the date of the incident, while he has been living in the same colony.

D. P.W.7 Iswarbhai Mangalbhai Thakor, aged 32 years, has been examined at Exh.22. He has stated that the accused appellant was known to him and on the date of incident in the evening when he came back from his job at about 7.30 P.M. accused appellant had come to him for taking the cycle and he had given the cycle to him. Thereafter, at about 9.35 P.M. when the T.V.Serial 'Om Namaha Shivaya' started, he returned the cycle and went towards the house of Mahijibhai. Thereafter, in the late night he came to know that the daughter of Mahijibhai was missing and he also went for her search. Next day her dead body was found and the Police had recorded his statement. He says that even prior to the date of the incident the accused appellant had taken his cycle and returned the same, many times. He has also stated that after 10.30 P.M. on the date of incident, when he came to know that Ramila was missing and he went to the house of Mahijibhai, he had told there that the accused appellant had taken his cycle.

(a) This witness has been examined to show that the accused appellant just prior to the time when it was known that Ramila was missing, was moving around the house of Mahijibhai i.e. father of deceased and after handing over the cycle to this witness, he had gone towards the house of Mahijibhai. Obviously, this witness has been examined to lend support to the prosecution case that appellant was a person, who could be the person last seen around the house of the deceased and just before the time when it became known that Ramila was missing.

(b) Although this witness has stated in the cross-examination that he had disclosed, the factum of the cycle being taken by the accused appellant and his going towards Mahijibhai's house, after it became known that Ramila was missing and that this witness had gone to Mahijibhai's house, P.W.3 Mahijibhai has not stated anything on this aspect of the matter.

E. Next witness P.W.8 Maganbhai Khodabhai Thakor, aged 26 years, engaged in the occupation of driving, has been examined at Exh.26. This witness has stated that on 5.1.99 while he was sleeping at his house at about 10.00 P.M., Mahijibhai alongwith his wife had come to his house and told him that on their return from the house of Kalidas after watching the T.V. Serial, they found that their daughter Ramila was not there in the house on her bed and, therefore, they are in her search. This witness

says that he also went in search of Ramila and in the way he met Bhikhabhai Mangalbhai and while they were on way towards the Nali in the search of Ramila they saw accused appellant from Nali side coming. The accused appellant told that there is darkness at Nali and, therefore, they should not go there. At that time, it was about 11.00 P.M. Accused appellant then told that he was going to his house and having said so, he went to his house but this witness continued with the search but Ramila was not found till the morning. Ramila's father then reported the matter to Police and thereafter, Ramila's dead body was found and thereafter on the 3rd day the police dog had caught hold of the accused appellant and the dog had jumped thrice over the accused appellant. In the cross-examination there appears to be some error in recording that the witness had denied the suggestion that at the time of incident, the accused appellant was not in his house. Obviously, in cross - examination it could not be suggested that the accused was not in his house at the time of incident, more particularly when this witness has already stated and has also agreed to the suggestion in the cross examination that the accused appellant had met him on the way while coming from Nali side and asked the witness not to go towards Nali and that this fact has been disclosed by this witness for the first time before the Police. In the end he has denied the suggestion that he was giving a wrong statement at the instance of Muljibhai.

(a) This witness has been examined to establish incriminating circumstances against the appellant accused inasmuch as he has prevented this witness and the persons in search of Ramila to go towards Nali in the night and that immediately after Ramila was found to be missing and that at about 11.0 P.M. i.e. after the Serial was over at 10.30 P.M. when Ramila was being searched, he was seen coming from Nali side i.e. spot wherefrom the dead body of Ramila was recovered on the next day and this is how the appellant accused stands connected with the offence as there could not be any reason for anyone to go to Nali in the darkness and come back late at 11.0 P.M. in a chill cold night in darkness and according to the prosecution it is a very strong circumstance to connect the appellant accused with the offence at the first available opportunity and immediately after the incident had taken place and on the very same date of incident.

(b) Mr. Shah, learned counsel for the appellant accused, has submitted that according to this witness, Mahijibhai and his wife had reached the house of this witness at 10.0 P.M. itself, which is on the face of it

wrong because it has come in the evidence of Mahijibhai himself that they were watching the T.V.serial till 10.30 P.M. and it was only after 10.30 P.M. that they came to know that Ramila was missing. It has also been pointed out by Mr.Shah that according to this witness one Bhikhabhai Mangalbai had met him on the way when he was going towards Nali in search of Ramila and at that time the appellant accused met him while coming from Nali side. Mr. Shah has submitted that Bhikhabhai Mangalbai, was the witness and was the only person who could corroborate this witness on the question of accused appellant coming from the Nali side and meeting the witness on the way and preventing the witness from going towards the Nali, but Bhikhabhai Mangalbai has not been examined and, therefore, the version of this witness remains uncorroborated although no explanation whatsoever has been given for non examination of Bhikhabhai Mangalbai by the prosecution. On this aspect of the matter according to Mr.Shah this witness even otherwise should not be believed because he has not disclosed the story of accused appellant coming from the Nali side and meeting him on the way to Nali and preventing him from going towards the Nali to anyone except the Police.

F. P.W.5 Muljibhai Desaiabhai Thakor, aged 48 years, Exh.20, has stated in the examination in chief that Popat i.e. brother of the accused appellant had met him when he was accompanied by Thakor Fatehsinh on 6.1.99 in the afternoon about 2.30 or 3.00 P.M. He says that at that time he was going towards his field and they were coming from the Nali side and they informed him that the dead body of Ramila was lying ahead. This witness therefore went to the Sarpanch and a group of persons had collected there and they all went towards the dead body and it was found that the dead body was lying without cloths. Thereafter, on the other day police came with dog and dog was taken to the spot where the offence had been committed and therefrom it came to Mahijibhai's house and thereafter it came to the house of the appellant accused and therefrom the dog went to the Chowk where the dog jumped on the accused appellant for three times. In cross-examination this witness has stated that he was a Sarpanch about 15 years ago. He has denied the suggestion that the appellant accused did not vote for him when he contested elections and therefore he and the accused were not happily disposed of. It was voluntarily stated by this witness that he had family relations with the appellant accused. He has also denied the suggestion that in the Panchayat there were cases of embezzlement against him. While the witness has said that he had no

personal knowledge in this case he has denied the suggestion that dog had first pointed out Punambhai Vaghabhai and Chhaganbhai Mangalbhai.

(a) This witness has stated about the place of dead body and has categorically denied the suggestion made on behalf of the accused appellant that the accused appellant had been caught involved in this case at the instance of this witness on account of enmity because of the Panchayat elections.

(b) Mr. Shah has submitted that neither Popat nor Thakor Fatehsinh has been examined while both these persons had been named by this witness and it has been stated by him that on 6.1.99 when they met him in the afternoon while this witness was going towards his field and these two persons were coming from the Nali side and they had informed him that the dead body of Ramila was lying ahead. Mr. Shah has submitted that in fact according to this witness Popat and Thakor Fatehsinh were the first persons who had seen the dead body at Nali and, therefore, they were important witnesses, who have not been examined.

(c) However, this witness has categorically denied any ill will towards the accused appellant on account of not voting in his favour and he says that he was a Sarpanch about 15 years back and has also stated that he was having family relations with the accused appellant and has also denied the suggestion that the dog had first pointed towards Punambhai Vaghabhai and Chhaganbhai Mangalbhai.

G. P.W.9 Ambubhai Punjabhai Thakor, aged 38 years, has been examined at Exh.27. He is the Panch witness with regard to the scene of offence at Nali and other witness of the panchanama of the scene of offence is Champakbhai Gordhanbhai. He has stated that the place of incident was an unused place where the dead body was lying. He has then stated about 8 items, which were found lying on the spot and which were recovered by the police:-

- (1) a ball pen
- (2) a but of Rajkamal bidi
- (3) a cover of Rajkamal bidi containing 3 bidies
- (4) a sample of blood stained soil
- (5) a sample of unstained soil
- (6) an underwear
- (7) dry grass
- (8) a button with 4 holes.

These items are Exh.35 and Exh.36 is the panchanama of

the scene of the office.

(a) Mr. Shah, learned counsel for the appellant, has pointed out that there is no reference to any pant in Exh.36 and that the other panch witness, namely, Champakbhai Gordhanbhai has not been examined.

H. P.W.10 Ranchhodbhai Ravabhai Thakor, aged 46 years, has been examined at Exh.37. This witness is the panch witness of dog tracking. He has stated that on 8.1.99 he was called by the police at Indira colony of Lakkadpura at about 9.00 to 9.30 A.M. The dog while roaming went towards Nali at the place of the offence where it was made to smell an underwear and a pant. The dog then went to the deceased girl's house i.e. house of Mahijibhai. From there the dog went to the house of the accused appellant and thereafter it went to the place where the public had assembled and there the dog jumped thrice over the accused appellant. The dog did not take any jump over any one else. The Panchanama was prepared accordingly. The other panch witness was Punambhai Punjabhai. This panchanama is at Exh.38.

(a) Learned counsel for the appellant accused has pointed out that there is no item like pant in Exh.36 i.e. the panchanama of the scene of offence and the other Panch Punambhai Punjabhai has not been examined.

I. P.W.11 Chhaganbhai Mangalbhai Thakor, aged 40 years, has been examined at Exh.39. He is the panch witness with regard to the discovery panchanama under S.27 of the Indian Evidence Act. The other panch witness of this panchanama is Rajubhai Dahyabhai. This witness has stated that he had been called on 8.1.99 by the Police to be a panch witness and was told by the police that appellant accused wanted to disclose something and, therefore, a panchanama was required to be prepared. He says that he was called in the afternoon at about 3.30 P.M. He has stated that the appellant accused led him and the police people first to the house of Mahijibhai and, thereafter, to the way leading to Nali via the house of Kalidasbhai. Near the Nali there was a bush where he had thrown the underwear. Then he shown the unused Nali and told them as to how the incident took place. At Nali he also pointed out a Shawl of Maroon colour on which there was some grass. This Shawl was taken into custody by the police. Therefrom, they came back to the house of the appellant accused where he shown a blue colour (Bhura pant) pant and a shirt. There were some spots on the pant. The police took the pant and shirt into custody and sealed and signed them. The same are articles 9,10

and 11 and the Panchanama Exh.43 was prepared. In the cross-examination he has stated that the shirt, which was got recovered by the appellant accused, had 4 buttons. He had not counted total number but there were about 4 buttons and 2 buttons on the lower side were not there i.e. at 2 places buttons were not there.

(a) Mr.Shah, learned counsel for the appellant, has submitted that as per this witness he was called in the afternoon at about 3.30 P.M. on 8.1.99 whereas according to P.W.10 Ranchhodbhai Ravabhai Thakor the dog tracking was held in the morning at 9.00 to 9.30 A.M. on the same date i.e. 8.1.99 and, therefore, the pant, which was recovered in the afternoon, could not be offered for smell to the dog in the morning on the same date i.e. 8.1.99.

J. P.W.12 Jagatsinh Savabhai Gadhvi, A.S.I., has been examined at Exh.12, who has investigated the case as an accidental death and has not stated anything which is of importance for the purpose at hand.

K. P.W.13 Madhavsinh Pahadsinh Vasava has been examined at Exh.57. he is the concerned Police Inspector who has investigated the offence. He has prepared the inquest report, had sent dead body for post mortem, prepared the panchanama of the scene of offence, has collected 8 items from the scene of the offence, to which reference has been made by P.W.9, has conducted the dog tracking, arrested the accused appellant, had also taken into custody the shirt, pant and the Shawl and prepared panchanamas and map etc. and recorded statements of the witnesses and after the receipt of the post mortem report had also sent the muddamal to the F.S.L., Ahmedabad and S.S.G.Hospital, Vadodara. He has referred to muddamal articles 1 to 8 and 9 to 11. He has stated that all the Panchanamas bear his signature and the signatures of the panch witnesses made in his presence and has also referred to the Certificate of the F.S.L., Osteopathic Certificate and the Certificate of SSG Hospital and the medical examination of the accused appellant.

5. Having discussed the oral evidence, as above, we now come to the evidence of the Doctors. P.W.1 Dr.Rajesh Shambhulal Thakkar has been examined at Exh.7. He was working as the Medical Officer at S.S.G.Hospital, Petlad. He has stated that on 6.1.99 the dead body of Ramila, daughter of Mahijibhai was brought to him for post mortem examination by the police alongwith the police yadi at about 6.30 P.M. Since the post mortem was to be conducted by a panel and it was already evening by the

time the body had been received, the post mortem was taken up on the next day i.e. 7.1.99 in the afternoon at 2.0 P.M. at Karamsad. He had seen the dead body at Petlad in the morning of 7.1.99 but whereas the expert opinion was necessary and there is medical college at Karamsad, the body was taken to Karamsad and there in the afternoon the post mortem was conducted. Dr. D.R. Khadayate and Dr.Gupta, who is head of Department of Forensic Medicines were associated in conducting the post mortem and two tutors, namely, Dr.Sunil Bhatt and Dr.Satish Patel, who were working under Dr.Gupta were also present. The post mortem, which was started at 2.0 P.M. was over at 5.00 P.M. According to this witness, the age of the deceased female child was about 5 years. There was a blue colour (Bhura) full sweater without buttons on the dead body and a half shirt with green and coffee colour lines. Having given description about the built of the body, etc. he has deposed that there were 7 external injuries on the body out of which injuries No.1 to 6 were ante mortem and injury No.7 was post mortem. The description of the 7 injuries is as under:-

- "(1) Three oval shaped contusions with abraded surface over the left cheek each size 2 cm x1.5 cm with intervening clean space.
- (2) Contusion with abraded surface on the left thigh on inner surface obliquely going, size 8.5 cm x 1.5 cm.
- (3) Inner surface of lower lip bruised in the area of 2 cm x 1 cm in the left half.
- (4) Laceration in the lower lip at the left angle of mouth, size 1/4 cm x 1/4 cm x 1/4 cm.
- (5) Inner surface of the upper lip in the left half bruised.
- (6) Posterior vaginal tear in the mid line extending upto Anus deep into vagina.
- (7) Skin is missing from the pubic area and both thigh on the medial surface and extending upto the abdomen 5 cm below umbilicus, size 21 cm (Horizontal) x 11 cm (vertical), skin deep muscles are intact. Labia majora and labia minora cut, margins are regular and sharp.
- Injury No.1 to 6 are antemortem.
- Injury No.7 is post mortem."

On the basis of internal examination he has stated that while there was no injury on the head, the brain was full of blood and congested, both lungs were congested. The right side veins of the heart were congested and were full of blood. Food pipe was empty but there was some

digested food in the stomach, in the small intestine there was digested food and in the bigger intestine there were stool deposits. Her liver etc. were congested and urinary bladder was empty. It has been opined that she must have taken her last meals before 6 hours of death. He has also stated that the samples were also taken for Osteopathic test and slide of vaginal swab was prepared and sent to F.S.L. Ahmedabad. It has also been opined that she should have died because of asphyxia as a result of suffocation and she must have died about 36 hours prior to the post mortem. According to the external injuries 2 and 3 and other injuries, it was likely to be a case of rape. He has also deposed that there may be asphyxia as a result of suffocation and in normal course it may result into death. He has proved the post mortem report, signed by him and Dr.D.R.Khadayate at Exh.10 and the death certificate is at Exh.11. Exh.12 is the letter sent to the Petlad Police Station for tests in Osteopathic Laboratory. It has also been stated that there were injuries on the interior of the upper lip on account of smothering. He has also stated in cross examination that he had not received the report of viscera. On being questioned by the Court he has stated that cause of death, which has been given in the post mortem note Exh.10, could be given even without the report of viscera and that he can say with certainty even without viscera report that the cause of death in this case was asphyxia as a result of smothering. This witness was examined on 26.7.99 but on the basis of an order passed on Exh.54 (Application dt.28.7.99 by prosecution to examine this witness with the photographs showing injuries as these photographs were not available on 26.7.99) this witness was recalled and was further examined on 28.7.99. On 28.7.99 he has stated that he had been shown the photographs Exh.53-I to 53-M alongwith the external injuries mentioned by him in column No.17 of the post mortem report Exh.10. Having seen the photographs and the injuries mentioned in the post mortem note, he has stated that injury No.7 was not likely to be caused by animal. If such an injury is caused by animal there must be bite marks. Whereas there is no bite marks the possibility of injury being caused by a sharp edged weapon is more. He has also stated that he had not come across any such case in which a person, who fails to commit the rape, may cause the injury No.7 as mentioned in column No.17 of the post mortem note Exh.10. In the further examination he has also denied the possibility of such injury being caused if the dead body is dragged by any animal and has explained that in that case, the depth of injury at different places would be different and it cannot be symmetrical whereas injury No.7 is similar all

over. He has also explained that in case there are insects over the dead body, the skin may be peeled off but in that case it cannot be of similar measure.

6. P.W.2 Dr.D.R.Khadayate, Exh.13, aged 42 years, is the Medical Officer, who was contacted with the police yadi Exh.8 for the post mortem of the dead body of Ramila on 6.1.99. He has stated that he alongwith Dr.Rajesh Thakkar in the penal had conducted the autopsy on 7.1.99 and the post mortem note Exh.10 was prepared, which bears his signature. The death certificate of Ramila Exh.11 also bears his signature. He has explained that in case a person dies because of suffocation resulting into asphyxia, it is not necessary that in every such case he must suffer the congestion of the wind pipe. In a given case it may not be there. He has further stated that on 9.1.99 he was contacted with police yadi for medical examination of the appellant accused Trikambhai. The Police yadi has been exhibited as Exh.14. He says that he had first taken the consent of the accused appellant for his medical examination, also asked his name, age etc. He disclosed his name to be Trikambhai Ravjibhai Thakor, gave out his age to be 20 years and that he was resident of Lakkadpura Indira Colony. He says that the appellant accused was examined on 9.1.99 in the afternoon at Petlad. On his left leg above knee in the middle part there is an old mark of injury (identification mark). He says that he asked the accused appellant as to what had happened and the accused appellant in his own words disclosed the above sexual conduct as under:-

Translitteration:

"HOO RATRE SADE NAV THI PONA DAS VAGE CHHOKARI
TAPU (RAMILA) NE UTHAVI NE NALI MA LAI GAYALO. TENI
CHADDI KADHELI ANE PACHHI TENE UPER CHADHELO. PACHHI PAG
PAHOLA KARELA. MAI ANO MODHO DABAVYO ANE SAMBHOJ KARVANI
KOSHIS KARELI. MODHA UPAR BACHAKA BHARYA. MAI SAMBHOJ
MATE ADADHA KALLAK SUDHI PRAYATN KARYO. CHHOKRI MARI
GAYI JEVU LAGELU PACHHI HOO GHARE AAVI NE SUI GAYALO."

English translation:

"AT ABOUT 9.30 TO 9.45 IN THE NIGHT I HAD LIFTED
THE GIRL TAPU (RAMILA) AND TAKEN HER TO NALI, REMOVED HER
CHADDI AND CAME OVER HER. THEN WIDENED HER LEGS. I
PRESSED HER MOUTH AND TRIED SEX. BITTEN ON MOUTH. I
TRIED SEX FOR HALF AN HOUR. I FELT THAT THE GIRL HAD
DIED, THEN I CAME TO HOUSE AND GONE TO SLEEP."

(a). This disclosure as has been made by the accused appellant to this Doctor P.W.No.2 had been recorded by the witness in the medico legal certificate No.16 dt.9.1.99 itself and has been produced by the witness

during the course of his deposition as mark 9/14 and the same is Exh.15. The learned defence counsel in the trial took an objection that the above portion in the Certificate mark 9/14 i.e. Exh.15 is a self inculpatory statement and, therefore, the document mark 9/14 i.e. Exh.15 should be read and exhibited except for the portion, as aforesaid, which is in Gujarati. The trial court has sustained this objection and the document has been marked as Exh.15, as has been recorded in the body of the statement of this witness.

(b) This witness has also deposed that the accused appellant had changed his cloths as disclosed by the accused appellant himself and that he had come to this witness after taking bath. The accused appellant had given out before this witness that he is an unmarried person. This witness has also deposed that the appellant accused was mentally normal, there were no marks of injury either on his body or on his private parts and his private parts were fully developed. He has also stated that he examined the private parts of the accused appellant and nothing abnormal was detected. The witness further deposed that in order to examine the semen, the appellant accused was asked to masturbate. He got erection but did not eject semen and, therefore, semen could not be examined. His blood group was found to be "B-Rh" positive. The samples of pubic hair and saliva of the appellant accused were taken for forensic test and were given to the police. X-rays were also taken for determination of his age and were sent to Radiology Department of SSG Hospital, Baroda.

(c) In the corss-examination this witness has stated that injury No.6, as has been mentioned in Exh.10 P.M.Note, could not be a post mortem injury. He has denied the suggestion that the appellant accused could not ejaculate because he was impotent. He has explained that it is not necessary that in case a person masturbates, he must ejaculate semen, even impotent person can ejaculate semen. He had categorically denied that an impotent person cannot eject out semen. He has stated that it was correct to suggest that at the time when the appellant accused was brought to him he was in police custody and that in the police yadi Exh.14 he had not been asked to record the version of the accused appellant.

7. Besides the evidence as above, we may also make a brief reference to the documentary evidence, as under:-

(1) Exh.8 is the police yadi with which P.W.1

Dr.Rajesh Thakkar was contacted on 6.1.99 for the post mortem of dead body of Ramila.

- (2) Exh.10 is the post mortem note dt.7.1.99 of Ramila duly signed by Dr.Rajesh Thakar, P.W.1 and Dr.D.R.Khadayate, P.W.2.
- (3) Exh.11 dt.7.1.99 is the death certificate of Ramila signed by Dr.Rajesh Thakkar, P.W.1 and Dr.D.R. Khadayate, P.W.2.
- (4) Exh.12 is the letter addressed to the police by the Medical Officer for the test of viscera and Osteopathic test.
- (5) Exh.14 is the letter sent to the Medical Officer by the Police for the medical examination of the appellant accused on 9.1.99.
- (6) Exh.15 is the medico legal certificate dt.9.1.99 issued by P.W.2 Dr.D.R.Khadayate.
- (7) Exh.17 dt.6.1.99 is the report made by Mahiji i.e. Ramila's father that Ramila was missing.
- (8) Exh.18 is a photograph in which there are 2 males, 2 females and 2 kids including Ramila, which were given to the Police by Mahijibhai at the time when the report Exh.17 dated 6.1.99 was made.
- (9) Exh.23 is the inquest panchanama.
- (10) Exh.24 is the panchanama dated 8.1.99 of the place of the house of Mahijibhai (father of deceased Ramila).
- (11) Exh.25 is the panchanama dt.8.1.99 of the accused.
- (12) Exhs.28 to 35 are the slips dt.6.1.99 bearing the signatures of the Panch Witnesses, which were used at the time of sealing the articles Nos.1 to 8, which were found at the place and which were collected by Police and sealed.
- (13) Exh.36 is the panchanama of the scene of offence.
- (14) Exh.38 dt.8.1.99 is the panchanama of dog tracking.
- (15) Exhs.40, 41 and 42 dt.8.1.99 are the slips bearing signatures of panch witnesses, which were used at the time of sealing articles Nos.9 to 11, which were recovered at the instance of the accused (under S.27 of the Evidence Act).
- (16) Exh.43 is the panchanama showing the place of the offence by the accused.
- (17) Exh.44 is the police report dt.6.1.99 sent to the Civil Surgeon for the purpose of post mortem.
- (18) Exh.45 is the letter by which muddamal were sent to the Forensic Science Laboratory.
- (19) Exh.46 is the report of X-ray for the age determination of the accused.
- (20) Exh.47A- Exh.47B are the letters dt.25.1.99 by

the Forensic Science Laboratory to the Police with regard to the receipt of the muddamals as were sent by the Police.

- (21) Exh.48 is the letter dt.30.1.99 sent by Forensic Science Laboratory, Ahmedabad to the Police in continuation of the earlier letter dt.25.1.99 informing the police that Osteopathic test is possible only in the Medical College and, therefore, if Osteopathic test is to be conducted, viscera, which has been sent, may be taken back and if only chemical examination is to be done, Forensic Science Laboratory may be informed accordingly and that action be taken only after the receipt of the reply.
- (22) Exh.49 is the letter dt.15.4.99 sent by Forensic Science Laboratory to the Police that correspondence may be made with Scientific Officer Mr.P.M.Acharya.
- (23) Exh.49- Papers sent by Forensic Science Laboratory to the police with the report of the Scientific Officer under covering letter dt.15.4.99.
- (24) Exh.50 is the Map of the scene of offence.
- (25) Exh.53 to 53M are the photographs of the dead body of Ramila.

8. Taking note of the injuries and the cause of death, as has been given in the post mortem note Exh.10 and the presence of blood mixed with in the sample No.15, vaginal swab and sample No.16 vaginal smear, as reported by Scientific Officer of the Forensic Laboratory in the papers with Exh.49 and the statements of other witnesses, it is clearly established that deceased Ramila, a girl of about 5 years, was lifted from her house on the night of 5.1.99 between 9.30 to 10.30 P.M., was taken to the lonely place of Vaniyavali Nali in a dark chilly night and was subjected to the heinous offence of rape in an inhuman and cruel manner and was done to death thereafter by suffocation and thus it is a clear case of homicidal death on account of suffocation resulting into asphyxia. Hence the offences punishable under Sections 451, 363, 376(2)(F) and 302 I.P.C. have taken place. Necessarily the question arises as to who has committed these offences and as to whether it is the appellant accused, who has committed these offences?

9. In absence of any eye witness and no direct evidence, the entire case of the prosecution is based on the circumstantial evidence. The offence was committed on 5.1.99, the dead body was found on 6.1.99, the post mortem was conducted on 7.1.99 and it was on 8.1.99 that

as a result of dog tracking the accused was zeroed in, when the sniffer dog jumped thrice over the accused, who was one of the persons in the group. It is on the basis of the evidence of dog tracking that accused is detected and traced but in order to establish that he is the person, who has committed the offences, as aforesaid, we will have to travel from the evidence to the accused. First of all name of the accused appears in the statements of Kalidas - P.W.4, who is a cousin (Bhuva's son) of father of the deceased victim Ramila. There is no dispute that the house of Mahijibhai - P.W.3 and the house of this witness Kalidas -P.W.4 are situated opposite each other in Indira Colony, Lakkadpura, and the accused also lives in the same colony at about 4 to 5 houses away from the house of Mahijibhai i.e. father of the deceased and the house of the accused is also in the same row. According to P.W.4 Kalidas while the T.V.serial was going on he came out of his house for urination and found that the accused was standing with Tapu (Ramila) outside the house of Mahijibhai and on being questioned by P.W.4 Kalidas, accused answered that the girl was crying and, therefore, he was bringing her to her mother. Kalidas - P.W.4 then quietly returns in his house. In normal course he should have immediately asked the accused that the mother of the girl is sitting in his own house watching T.V. and, therefore, he will take Ramila with him and accused need not to bother and may go. Instead of doing so, he not only quietly enters back in his house, also goes and resumes watching of the T.V., does not even take care to inform either of the parents of Ramila that the accused was standing out with Ramila because she was crying, he does not even inform them of this fact even after the serial is over and when parents of Ramila left his house. This conduct of P.W.4 Kalidas is not only unnatural but is not capable of any plausible explanation. He is a close relative of Mahijibhai, happens to be the uncle of deceased Ramila (her father's cousin as Bhuva's son) and yet he did not feel any concern although he himself saw a third person, not being a member of their family, standing out of the house of Mahijibhai in the night hours with a minor girl, who was stated to be crying. He has further stated that he had to go to Ambaji with his vehicle and, therefore, immediately after the serial was over, he left for Ambaji. In the cross - examination he says that while the visitors of the T.V.serial at his place were leaving back for their houses, he left for Ambaji within their gaze and he did not know at that time that Ramila was missing and he has denied the suggestion that on that night he had gone with Mahijibhai in search of Ramila. If we compare his say with the statements of Mahijibhai,

we find that Mahijibhai - P.W.3 has not stated a word about Kalidas leaving for Ambaji while Mahijibhai was leaving for his house after the T.V.serial was over. On the contrary, P.W.3 Mahijibhai has stated in the cross examination that while he alongwith his wife etc. left for his house, Kalidas remained in his house and further that while they were searching for Ramila, Kalidas came there and had also started searching Ramila. We find that P.W.3 Mahijibhai i.e. father of deceased Ramila is a straight forward witness and is quite believable. If this witness is believed, it is clear that P.W.4 Kalidas has associated in the search of Ramila, the fact that Ramila was missing had become known to him after the T.V.serial was over and, therefore, it is all the more surprising that he did not disclose the fact that he had seen accused with Ramila outside the house of Mahijibhai while the serial was going on and he had gone to urinate and that on questioning accused had answered that since Ramila was crying, he was bringing her to her mother. Therefore, on the question of leaving for Ambaji immediately after the serial was over, on the question that Kalidas did not know at that time that Ramila was missing and on the question that he did not associate in search of Ramila with Mahijibhai, he stands contradicted by P.W.3. Not only that this witness Kalidas - P.W.4 has deposed that he came back from Ambaji in the evening of the next day at about 8 to 8.30 P.M. i.e. on 6.1.99 and that when he came to the house, his wife told him that the present appellant had been caught in this incident, in which he had committed rape upon the daughter of Mahijibhai. Now we find that this deposition is on the face of it false inasmuch as till the evening of 6.1.99 the appellant was no where in picture with regard to this incident, what to talk of being caught for committing rape upon daughter of Mahijibhai. All that was known till 6.1.99 evening was that Ramila had been raped and done to death. Who had done it was not known to anybody and, therefore, there is no question of the wife informing this witness on 6.1.99 that the appellant had been caught with regard to this incident for committing rape upon the daughter of Mahijibhai. In the cross-examination he has stated that his wife narrated to him the incident which took place with Ramila and told that the appellant had raped, had bitten her and had killed her. On consideration and comparison of the statements made by this witness Kalidas P.W.4 with the statements of P.W.3 Mahijibhai and the fact that the present accused was apprehended for the first time on 8.1.99, we find that not only that the conduct of this witness has been unnatural and incomprehensible, this witness has positively made a false statement and is not

at all reliable. This is besides the fact that his wife has not been examined by the prosecution, nay she was summoned and then not examined, for which there is no apparent reason. In the cross-examination he has denied the suggestion that on the day of incident instead of going to Ambaji he had gone alongwith accused for drinking liquor at the place of Rajubhai, who sells liquor. However, he has agreed to the suggestion that there was a case of rape against him. The endeavour of the prosecution was to bring the evidence of accused being last seen in the company of the deceased, through this witness, but on over all consideration of the statements of this witness read with other evidence, we find that this witness is not at all reliable and so far as the testimony of this witness is concerned, we find that he cannot be taken to be a trustworthy witness for the purpose of evincing the fact that accused was last seen in the company of the deceased immediately before it became known that Ramila was missing.

10. We do not find any reason to disbelieve P.W.7 Ishwarbhai Exh.22 when he says that on the date of incident when this witness came back from his job in the evening, the accused had come to his house to take his cycle, he had taken the cycle and then he came back to return the cycle after about 5 minutes of the starting of the T.V.serial and having returned the cycle, the accused went towards the house of Mahijibhai i.e. father of the deceased. In the cross-examination this witness has stated that even prior to the date of the incident, the accused had taken cycle from him many times and had returned the same. In this view of the matter, we find that on the date of incident, it was not a new or unusual act on the part of accused so as to take the cycle of this witness and return the same. The only part of the statement of this witness which swings the needle of suspicion against the accused is that after returning the cycle the accused went towards the house of Mahijibhai, while the T.V.serial was going on, but that is hardly sufficient to establish that accused was the person last seen in the company of deceased.

11. P.W.8 Maganbhai Exh.26 is certainly an important witness, who has deposed that on the night of the incident while he was on search of Ramila and was going towards the Nali, the accused met him while the accused was coming back from the Nali side and the accused told this witness that there was darkness in the Nali and, therefore, the witness should not go towards Nali. Having said so, the accused said that he was going to his house. We do not find any reason to disbelieve this

witness and his testimony has remained untrammelled during the cross examination. This witness certainly takes the accused nearer to the deceased to the extent that perhaps he could be the last person with the deceased. In normal course, neither the accused had any reason to go towards the Nali nor he was supposed to say no to the person, who was on search for Ramila on that night and to that extent the testimony of this witness goes against the accused and points out a strong circumstance about the involvement of the accused in the offence. It is a different matter altogether that Bhikhabhai Mangalbai, who had also met in the way to this witness while he was on search for Ramila and before he went towards Nali in search of Ramila, has not been examined by the prosecution.

12. Thus on the question of the evidence against the accused for being last person with the deceased, the only strong circumstance is that at about 11.00 P.M. on the same night he was coming from Nali, had met witness P.W.8 Mangalbai, who was on search for Ramila and he tried to prevent the witness from going towards the Nali by saying that there was darkness and he should not go.

13. So far as P.W.6 Manishaben is concerned, she is a girl of 14 years and with reference to her evidence, we find that in normal course it may not sound natural that a boy, who is living in this very colony near the house of this witness, would go to the neighbour's house in the night and give a call in the name of the mother of this witness and when the girl comes out he would make a proposal for 50 rupees while the girl is in the house with her parents, younger brother and sister. But how human mind works at a particular point of time cannot be said with any certainty and, therefore, it is not possible to say with certainty as to whether that accused acted in that way on that particular day of incident or not. In any case, the purpose of prosecution in examining this witness is only to establish that on the date of incident, the accused was moving around with a sexual urge and nothing beyond it.

14. P.W.5 Muljibhai is the witness who has disclosed as to how the dead body of Ramila was found on 6.1.99. The version of this witness is that on 6.1.99 in the afternoon at about 2.30 to 3.00 P.M. while he was going towards the filed, the brother of accused Popat alongwith Thakor Fatehsinh met him while they were coming from the side of Nali and they informed him that the dead body of Ramila was lying ahead, he went to the Sarpanch, few people were collected, Mahijibhai was also taken and

thereupon they were able to locate. He has then pointed out about the police calling the dog squad and that the sniffer dog was taken to the place of the offence, the dog then came to Mahiji's house and then to the house of accused and thereafter in the Chowk the dog jumped thrice over the accused. In the cross examination he has stated that he was a Sarpanch 15 years ago and has denied the suggestion that he was biased against the accused because in the election accused did not vote for him. We have no reason to disbelieve the testimony of this witness. However, we find that Popat and Thakor Fatesinh, who had informed this witness about the whereabouts of the dead body, have not been examined by the prosecution.

15. The dog squad was called and dog tracking was conducted on 8.1.99. The witness P.W.10 Ranchhodbhai, who is a resident of the very same Indira Colony, Lakkadpura, says that he was called by the police at about 9.00 to 9.30 A.M. in the morning of 8.1.99 to be a panch. The dog was taken to the Nali i.e. place of the offence and the dog was made to smell a chaddi and pant. The dog first went to the house of Ramila and therefrom to the house of the accused. The public had assembled and the dog jumped thrice over the accused. With regard to this dog tracking panchanama Ex.38 was prepared. He has also stated that prior to jumping over the accused the dog had just smelled Punambhai Vaghabhai and Chhaganbhai Mangalbhai, but did not do anything else. There is no reason to disbelieve this witness and, therefore, we find that so far as the result of dog tracking is concerned, it goes against the accused. However, we notice that P.W.13 Madhavsinh i.e. Police Inspector, who has investigated the case, has stated in the cross examination, para 11 of his statement Exh.57, that alongwith the dog squad, the expert man i.e. dog handler Ganpatsinh Chauhan was there, who was called through a wireless message (referred in para 10), but this dog handler Ganpatsinh Chauhan has not been examined by the prosecution.

16. On the question of the articles Nos.1 to 8, which were found at the scene of offence on 6.1.99 and which were taken into custody by the police and sealed vide Exh.28 to Exh.35, for which Panchanama Exh.36 was prepared and articles Nos.9 to 11, which were recovered at the instance of accused on 8.1.99 under S.27 of the Indian Evidence Act and sealed as per Exhs.40 to 42 and for which Panchanama Exh.43 was prepared, the details were found as under on the basis of the result given by Forensic Science Laboratory which is Exh.49 shows that:
(a) sample 1 i.e. Matti (soil) was found to be blood

stained (human blood) - group undecided.

- (b) Sample 2 control matti was found to be blood stained.
- (c) Sample 3 - 3 bidis in a cover of Rajkamal bidi works -no blood, no saliva found when compared to sample 5 i.e. bud of smoked bidi.
- (d) It has been reported that thread on the bidi of sample 3 and the thread on the bud of sample of sample 5 was similar.
- (e) Sample 4 i.e. button with 4 holes, which was found from the scene of the offence, was compared with the buttons on sample 11 i.e. shirt of the accused and it has been found that it resembles with the white buttons on the shirt, the colour of which had become pale.
- (f) Sample 5 is the bud of the bidi, saliva is found to be present, but no blood. Group of Saliva on sample 5 has been mentioned as 'B' but against the group of saliva i.e. sample No.18, which was taken from the accused i.e. saliva of accused, the group has been mentioned as 'undecided' in the report of the Scientific Officer dt.5.4.99.
- (g) Sample 6 is the grass on which no blood was found and it has been identified as remains of a botanical product.
- (h) Sample 7 is the pant on which no blood was found.
- (i) Sample 8 is a synthetic torn chaddi of green like colour on which neither blood nor semen has been found.
- (j) Sample 9 is the Shawl (recovered at the instance of the accused) of Maroon colour, on which neither blood nor semen was found, but the remains of some grass stuck to it comparable with grass of sample No.16 and beyond this nothing more could be found.
- (k) Sample 10 is the pant (recovered at the instance of the accused) - synthetic cloth - black colour. Neither blood nor semen was found.
- (l) Sample 11 shirt (recovered at the instance of accused), full sleeve white and green design, neither blood nor semen was found.
- (m) Sample 12 - 14 i.e. shirt and rumal, human blood of group 'O' has been found, but no semen was found.
- (no) Sample 13 i.e. sweater, neither blood nor semen has been found.
- (o) Sample 15 - vaginal swab, human blood mixed with semen has been found, but the group has been reported as 'undecided', as per the report dt.5.4.99.

- (p) Sample 16 - vaginal smear - human blood mixed with semen has been found, but the group has been left 'undecided' as per the report dt.5.4.99.
- (q) Sample 17 - pubic hair of the accused - neither blood nor semen has been found.
- (r) Sample 18 - Saliva of the accused - It has been reported that it appeared to be saliva but in the report dt.5.4.99 the Group has been left 'undecided'.

17. Thus we find that on the basis of the results, which have been given by the Scientific Officer of the Forensic Science Laboratory, sample 15 - 16 i.e. vaginal swab and vaginal smear and the presence of blood mixed with semen therein support the commission of the offence of rape, but there is no sample of the semen of the accused and, therefore, there could not be comparison and cross-matching. P.W.2 Dr.D.R. Khadayate, who had examined the accused, has stated that the accused did not discharge any semen when he was asked to masturbate. On masturbation semen can not be discharged unless a person, who masturbates, is willing to discharge the semen. In any case, the fact remains that there was no semen of the accused as a sample for the purpose of test and samples 15 and 16 had been made use of while conducting the tests, as has been mentioned against these items in the report of the Scientific Officer and the prosecution did not ask for and did not get the DNA test conducted. Had any DNA test been conducted, something concrete could come out. Now at this stage, even we could not direct for DNA test because vaginal swab and vaginal smear samples 15 and 16 are no more available and the same are already made use of and as per the report on none of the other items i.e. cloths either of the accused or of the deceased Ramila or the Shawl or any other item, there is any stain of semen. Even with regard to Sample 18 i.e. Saliva of the accused, the group has been reported to be 'undecided' as per the report dt.5.4.99. Whereas the saliva on the bud of the bidi sample 5 has been mentioned as Group 'B'. P.W.2 Dr.D.R.Kahadayat has stated that the Group of the blood of the accused was "B-Rh Positive". However, the button with 4 holes, which has been found from the scene of the offence i.e. Sample 4, is found to be similar to that of the buttons on the shirt of the accused i.e. Sample 11. The description of sample 11 shows that 3 - 4 buttons of this shirt were missing. First button is a white transparent button, second button is a gray white but non transparent, 5th button and the buttons of both the sleeves were white transparent buttons, which had become pale. The white button, which had become pale, has 4 holes and the diameter of each of

which was 1.1 cm. The description of sample 4 also shows that it was a white button, which had become pale, it also had 4 holes and its diameter was 1.1 cm. It was transparent and made of plastic material with the thickness of 0.2 cm. Thus, button sample 4, which was found from the shirt, has been found to be resembling with those 3 buttons of the shirt - sample 11, which were white and which had become pale i.e. 5th button of the shirt and two buttons of the sleeve of the shirt, which had been found to be of the same diameter. The controversy has been raised on this aspect of the matter on behalf of the defence that the witness Chhaganbhai Mangalbhai Thakor i.e. P.W.11 (Exh.39) had stated in the cross examination that he did not know about the number of buttons on the shirt and that there were 4 buttons on the shirt and that lower 2 buttons were missing on the shirt whereas in the panchanama Exh.43 it was mentioned that there were 6 buttons on the shirt of the accused, out of which 2 and 3 from the bottom were not found and further that in Forensic Science Laboratory report about sample 11 it is found that 3rd and 4th buttons were missing and as per panchanama Exh.43 also 2 buttons have been found to have been missing from the shirt. Forensic Science Laboratory report also shows that 2 buttons were missing. We find that the description, as has been given in the Panchanama about missing buttons, is for all the buttons right from the lowest upto the collar. Therefore, this controversy is not of much significance. The fact remains that 2 buttons were missing from the shirt and the button which was found from the scene of the offence i.e. sample 4 is found to be resembling with at least 3 buttons of the shirt sample 11. They have been found to be resembling in colour, transparency as well as in size and number of holes.

18. Net result of the report of the Scientific Officer of the Forensic Science Laboratory is that on the bud of the bidi, saliva is of Group 'B', blood Group of the accused is 'B-Rh positive' and the button, which was found from the scene of the offence, has been found to be resembling with three of the buttons of the shirt of the accused - Sample 11 in colour, transparency, diameter and the number of holes.

19. Dr.D.R.Khadayate (P.W.2) had recorded the say of the accused in his Medico Legal Certificate No.16 dt.9.1.99 Exh.15, which we have quoted in the earlier part of this order. This part of this Medico Legal Certificate is in the nature of extra judicial confession. So far as the deposition of this witness P.W.2 before the Court is concerned, it is found from the

body of the statement itself that this witness had stated this extra judicial confession at verbatim in para 4 and the Certificate Mark 9/14 (which is Exh.15) was produced, to which objection was taken that it could be exhibited only bereft of the portion of extra judicial confession because it is a self inculpatory statement and this objection was also allowed by the trial Court. However, we find that even if this objection was sustained by the Court and the document mark 9/14 has been exhibited as Exh.15 minus the portion of extra judicial confession, the same has also been stated by the witness i.e. Dr.D.R.Khadayate in his statement and in no case the objection, as has been sustained by the trial court, can dilute the value of the disclosure, as has been made by the accused before the concerned Doctor. Whether Doctor was asked to record the say of the accused about the incident in the police yadi or not and even if it is found that at that time accused was in police custody, the fact remains that the accused had stated so before the witness, may be on the asking of the Doctor as to what had happened. The fact of the matter is that the accused in his own words had stated before the Doctor and the Doctor P.W.2 has deposed before the Court in his statement as to what had been given out by the accused. He has quoted the extra judicial confession in the words of the accused himself in para 4. The contents of para 4 of the statement of this witness show that witness had asked the accused as to what had happened? and in answer he gave out that in the night at about 9.30 to 9.45 P.M. he lifted the girl Tapu (Ramila) and took her to Nali, removed her underwear, came over her, pressed her mouth and tried to have sex, bitten on her face and tried sex for half an hour, he felt that the girl had died and then came to his house and gone to sleep. Technically the accused was in police custody because he was brought to the Doctor by Police, but he has given an answer to a question put by the Doctor, who was to examine him and the Doctor had only asked him as to what had happened. Moreover, it is not that the witness has disclosed this extra judicial confession for the first time before the court when he was examined. The fact remains that he had recorded on the same day i.e. on 9.1.99 when he examined the accused and gave Medico Legal certificate on 9.1.99 and this extra judicial confession is duly incorporated in the body of the Certificate, which is under the heading, "H/O Sexual contact according to Trikammbhai's own statement". Even if this portion has been kept out of being exhibited from the contents of Exh.15, when this document was produced before the court during the statement of witness P.W.2, the extra judicial confession of the accused made before the Doctor remains. It is not

as if the witness had been examined before the court and there for the first time he has come out with this version of the accused. The argument is raised that it is a self inculpatory statement. Every extra judicial confession will be self inculpatory statement and we do not find that this confession is required to be ignored and that the same cannot be relied upon merely because technically the accused was in police custody at that time. In the facts and circumstances of this case, though the accused was produced for examination with police yadi, even if technically he was in police custody, it is not a statement made to the police itself. Nor it is the case of the defence that any pressure was exerted on the accused and that he made this statement under coercion. It appears that the Doctor while examining him had asked him as to what had happened and he gave the answer in his own words and the Doctor recorded the same. Therefore, this disclosure made by the accused to the Doctor P.W.2 and as deposed by this witness P.W.2 before the Court in his statement can be relied upon against the accused even if we ignore such contents as a part of Exh.15 which were left from being exhibited out of Exh.15 by the trial court by sustaining the objection raised on behalf of accused, more particularly when we do not find any reason as to why the Doctor should try to falsely implicate the accused.

20. Thus the analysis of the entire evidence, as above, brings out following circumstances against the accused and we have to examine as to whether the same are sufficient to connect him with the offence and to show that he is the person involved in the commission of the offences.

- (i) On the date of incident i.e. 5.1.99 at 11.0 P.M. while he was coming from the side of the Nali (where the offence was committed) he met the witness P.W.8 Maganbhai and told him that there was darkness at the Nali and thereby prevented him from going towards the place where the offence was committed.
- (ii) As a result of dog tracking it was found that sniffer dog jumped thrice over him while he was standing in a group of persons, as has been stated by P.W.10 Ranchhodbhai, P.W.8 Maganbhai, P.W.5 Muljibhai and P.W.3 Mahijibhai.
- (iii) The answer given by accused before P.W.2 Dr.D.R.Khadayate - as deposed by this witness. While answering accused appellant stated that he had lifted the deceased girl, taken her to Nali,

laid her in the missionary position, pressed her mouth, tried sex for half an hour and when he felt that she is dead, came home and gone to sleep.

- (iv) Resemblance of the button, which was found from the scene of the offence, with the buttons of the shirt of the accused as per the report of the Scientific Officer and the Group 'B' of the saliva on the bud of the bidi.
- (v) That the blood Group of the accused is 'B-Rh positive' i.e. corresponding to the group of saliva found on the bud of the bidi.

21. Mr.D.M.Shah has submitted that on the basis of the evidence, which has been available in this case, the involvement of the accused in committing the offence is not at all established. P.W.4 Kalidas cannot be relied upon for the purpose of taking the accused to be the person last seen in the company of the deceased, the accused lives in that very area and, therefore, merely because one of the witnesses i.e. P.W.7 Ishwarbhai has stated that on the date of the incident, the accused had borrowed the cycle from him and that the cycle was returned immediately after the starting of the T.V.serial and, thereafter, he saw the accused going towards the house of Mahijibhai, would not afford any evidence on the question of accused being last seen in the company of the deceased. He lives in that very area and his house is also situated in the same row in which the house of Mahijibhai is situated and, therefore, on the basis of the say of this witness P.W.7 that the accused went towards the house of Mahijibhai, it does not bring out any case against the accused so as to connect him with the offences. While criticising the evidence of P.W.6 Manishaben as unnatural he has submitted that the say of this witness is not only unnatural but unbelievable, as a person like the accused living in that very colony would not dare to go to the house of a person in the same colony, give a call at the house in the night in the name of the mother of this witness and then offer a sum of 50 rupees. On the basis of this evidence, it cannot be taken that the accused somehow or other intended to satisfy his sexual urge on that day. Mr. Shah has also submitted that on the basis of the evidence of P.W.8 that the accused met him on the way of this witness in search of Ramila towards Nali and that at that time the accused was coming from the side of Nail and told him that there is darkness towards Nali, he should not go there, it does not connect the accused with the commission of the offence. He has also submitted that Bhikhabhai

Mangalbhai, who had met this witness before he met the accused, has not been examined by the prosecution. He has also submitted that while P.W.5 Muljibhai has named Popat and Thakor Fatesinh, who had informed this witness that dead body was lying ahead, they have not been examined by the prosecution. While making reference to the evidence of P.W.9 Ambubhai he has submitted that this witness has not stated about the recovery of any pant. The pant was in fact recovered on 8.1.99 in the afternoon at about 3.30 P.M. as per P.W.11, namely, Chhaganbhai and hence there was no question of the pant being made available for smell of the sniffer dog in the morning at about 9.00 to 9.30 A.M. on 8.1.99 as has been stated by P.W.10 Ranchhodbhai. While referring to P.W.10 Ranchhodbhai, who is a witness with regard to the dog tracking, it has been submitted that this witness cannot be said to be a trustworthy witness for the simple reason that although the pant was not available at 9.00 A.M. to 9.30 A.M. on 8.1.99, the witness has stated that the pant was offered for smell to the sniffer dog and thus he has made a factually incorrect statement, which renders his testimony to be doubtful. Mr. Shah has also submitted that besides the fact that the evidence on the basis of the dog tracking itself is a weak evidence and cannot be made the basis for conviction, the fact is that the expert man, who had come with the dog squad and the dog handler, who has been named by the Investigating Officer P.W.13, has not been examined. The Police Inspector Madhavsinh, who investigated the offence, has categorically named Ganpatsinh Chauhan as the dog handler and yet neither the dog handler has been examined nor any person, who had come as an expert with the dog squad has been examined and, therefore, in the facts and circumstances of this case, the evidence of dog tracking cannot be believed. With reference to P.W.3 i.e. Mahijibhai, the father of the deceased, it has been submitted by the learned counsel for the accused that he has not stated any such thing on the basis of which the accused can be connected with the commission of the offence. He has categorically admitted that he came to know against accused only on the basis of the dog tracking. Mr. Shah has also submitted that witness No.3 Mahijibhai has categorically named one Ichchaben, who had also come to see the T.V. serial on the day of the incident at the house of Kalidas, but she has not been examined by the prosecution. Further that the prosecution has also not examined the wife of P.W.4 Kalidas as a witness although she had been summoned. It has also been submitted that the evidence of P.W.1 Dr. Rajesh Thakkar only shows that the offence has been committed against Ramila but it does not bring out

anything against the accused that it was he who had committed the offence. About P.W.2 also it has been submitted that except for the admission of the offences which has been attributed and put in the mouth of the accused by this witness, his evidence does not establish any link with the accused for the purpose of commission of the offences. He has also submitted that at the time when the alleged admission is said to have been made before the Doctor, accused was in police custody and that in normal course, Doctor was not supposed to record the version of the accused, who had been brought to him by Police Yadi for the purpose of medical examination and it was nowhere mentioned in the Police Yadi that the Doctor has to record his statement or admission in any manner. It has been submitted that it was a self inculpatory statement and, therefore, the same is not admissible in evidence and that the objection raised on behalf of the accused before the trial court that this portion be left from being exhibited out of Exh.15 was sustained by the trial court. With regard to the report of the Scientific Officer of Forensic Science Laboratory, it has been submitted by Mr. Shah that the resemblance of the button, which was found from the scene of the offence and the button on the shirt of the accused, cannot be made the basis for conviction as such button can be found anywhere and it may also be a case of simple coincidence. There are factual inaccuracies with regard to the say of the missing buttons by the concerned witness, namely, Ambubhai P.W.9 and the description of the items. He has also submitted that the Group of the saliva, which was taken as sample from the accused, is not matching with the saliva as was present on the bud of the bidi. Merely because the blood group of the accused is 'B-Rh positive', it cannot be said that the accused stands connected with the saliva found on the bud of the bidi, which is of Group 'B'. Mr. Shah has submitted that the group of blood may not necessarily be the group of saliva and further that there may be many persons with blood Group 'B' or with saliva of Group 'B' and the present accused is not the only person, who can be said to be a man with saliva of Group 'B'. Mr. Shah has submitted that in no case the commission of the offence can be said to have been proved against the accused and that the prosecution has failed to establish the entire chain of the circumstantial evidence and that it is certainly a case in which the accused is at least entitled to the benefit of doubt and hence there is no question of either conviction or any sentence, much less the death sentence.

22. We may now deal with the cases cited on behalf of the appellant in support of the submissions that whatever

has been stated by the appellant before the Doctor P.W.2 is not an extra judicial confession and is not an evidence within the meaning of S.25 of the Indian Evidence Act, as to what is the evidentiary value of dog tracking and absence of injuries on the male organ of accused is a pointer towards his innocence.

(a) Makhan Singh v. State of Punjab, reported in AIR 1988 SC 1705. It was a case in which the son is alleged to have committed murder of his father to have lands of father transferred to him. Para 11 of the Judgment shows that the accused had gone to one Amrik Singh to make extra judicial confession. Amrik Singh has stated that the accused told him that as the police was after him he had confessed the fact so that he might not be unnecessarily harassed. The Court found as a question of fact that there was nothing to indicate that Amrik Singh was a person having some influence with the Police or a person of some status to protect the appellant from harassment. The Supreme Court observed that as rightly conceded by the learned counsel for the State that extra judicial confession is a very weak piece of evidence and is hardly of any consequence.

In the case at hand, it is not the case of the accused appellant that he was harassed by the Police and that he had made a statement before the Doctor to save himself from the police harassment.

(b) In the case of Balwinder Singh v. State of Punjab, reported in AIR 1996 SC 607, it was a case in which the charge against the father was for murder of daughters. The confession of the crime was made to one of the relatives, who lodged the complaint with the police after a delay of 3 days, although as a social worker she was with the police for 2 days in connection with some other case. In this case, the accused had made an extra judicial confession to P.W.3, who was a Pradhan of Mohalla and was a social worker. She visited the house of the accused on 20.3.84 on learning from the neighbours that the accused had killed his two daughters and it is on this date i.e. 20.3.84 that the extra judicial confession was made. However, this witness P.W.3, who was Pradhan of the Mohalla, lodged the complaint with the police on 23.3.84. The court found that the manner in which the judicial confession is alleged to have been made and the silence of P.W.3 for 3 days in disclosing the same to the police, even though she had admitted that she had been with the police between 21.3.84 and 23.3.84, renders it unsafe to rely upon her statement. This unexplained long delay in lodging the F.I.R. detracts materially from the

reliability of the prosecution case in general and testimony of P.W.3 in particular. The court found that the alleged extra judicial confession is surrounded by suspicious circumstances and the prosecution has not been able to establish that the appellant had made any extra judicial confession to P.W.3 Satya Walia and, therefore, this circumstance remained unestablished.

Such is not the fact situation in the case at hand.

(c) In J.A.Naidu v. State of Maharashtra, reported in (1980) 1 SCC 206, the Court considered the confessions made before the raiding parties headed by the Assistant Collector of Customs in presence of Intelligence Officers. It was a case in which 14 accused were tried for offences punishable under Sections 120B, 161, 165-A and 218 of I.P.C., Sections 5(1)(a) and 5(2) of Prevention of Corruption Act, 1947 and Sections 135 and 136 of Customs Act, 1962. The confessions were said to have been made by accused Nos.1 to 11 at the time of production of currency notes by them and the goods in question. The trial court was of the opinion that whatever the currency notes and the goods might have been produced by accused within the sight of Sainani (P.W.11), the latter was then not within the hearing of the accused and the concerned Customs officials. The High Court held that the entire evidence of the Customs Officers and Police Officer Sainani with regard to the confessional statement of accused 1 to 11 is inadmissible and cannot be relied upon as evidence against the accused, because it found that the presence of the police seems to have been procured because the Customs Officers had a lurking suspicion about the conduct and integrity of the Excise staff and they were deliberately kept present to overawe the Excise Officers and that object seems to have succeeded and if that be so, all the incriminating statements made by accused 1 to 11 either in relation to money or the goods will have to be eliminated from consideration altogether. The Supreme Court agreed with the view taken by the High Court.

In our opinion, this case is of no help to the appellant in the facts of the present case as the accused had made this statement to the Doctor during the course of his medical examination and even if the accused is taken to be in police custody at that time because he was taken to Doctor under police yadi, it cannot be said that he was overawed in any manner and it appears in the facts of this case that it was a statement made by the accused to the Dr.P.W.2. on his simple question as to what had

happened.

(d) In the case of *Mulak Raj v. State of Haryana*, reported in 1996(1) Crimes 24 (SC) the Supreme Court was concerned with the case of murder of one Krishna Kumari in Kitchen by father-in-law, husband and sister-in-law in a case of dowry death. The Supreme Court has considered the evidence regarding extra judicial confessions in para 19 of this judgment as under on page 33 :-

"19. That takes us to the consideration of the evidence regarding extra judicial confessions of accused Nos.1 and 2. We may at once state that coupled with the evidence of motive, if the evidence of extra judicial confessions of accused Nos.1 and 2 stood the test of scrutiny then there would have been cast iron case against accused Nos.1 and 2. However, unfortunately for the prosecution, on this score it has drawn blank. It is the case of the prosecution that in the months of November, December 1977 accused Nos.1 and 2 approached P.W.10 Hari Kishan who was a member of the Ad-hoc Committee of the Janata Party and P.W.13, Gopal Dass who was an employee of the father of deceased Krishna Kumari and stated before them that they had committed mistake and that they had killed the girl in anger and they should get the matter amicably settled. That again after 15 days the accused met the witness Hari Kishan and stated that the girl cannot come back and that they are prepared to compensate. The evidence of this witness was disbelieved by the learned Trial Judge as in the court itself the witness was not in a position to point out accused No.2 and he pointed out instead one Vinod Kumar, who was alleged to have made the confession before him. Even that apart the statement of the witness that he had informed Shri Taneja, that is, father of deceased Krishna Kumari about this confession, is not corroborated by the evidence of P.W.23, Shri Taneja himself. The witness also did not inform any one about the so-called confessional statements of the accused. His further statement was recorded by the police on 20th January 1978 in connection with this alleged extra-judicial confession of the accused. If there was any such confession made by the accused before him in November or December there is no reason why he should not have gone to the police immediately and reported about the same when investigation was in progress and even a criminal complaint was filed by the father of the deceased in the Magistrate's court and summons were issued to the accused. Consequently no reliance could be placed on the extra judicial confessions said to have been made by the accused before him. The witness was also not known to

any of the parties and hence it was unlikely that accused would confide in him and confess their guilt before him. The learned Trial Judge was, therefore, justified in not placing reliance on extra judicial confessions of accused Nos.1 and 2, said to have been made before this witness."

In the present case the accused was arrested on 8.1.99 after dog tracking, he made the statement before the Doctor during the course of his medical examination and the Doctor recorded the same then and there on the very same day in the Medico Legal Certificate and narrated the same before the Court during the course of his examination before the Court. We, therefore, find that this case is of no help to the accused, as the evidence which was considered by the Supreme Court and the facts and circumstances in which the extra judicial confessions were made and reported are entirely different and in the case before the Supreme Court there was a considerable delay with regard to the point of time when the extra judicial confessions were made and the time when it was reported and recorded by police.

(e) In yet another case of State of Haryana v. Rajinder Singh, reported in 1996 Cri.L.J.1875, extra judicial confession allegedly made before many villagers was found unreliable. In this case the statement as was recorded stated about assault on the deceased by mistake and the Court, therefore, found that if a statement is not true, that cannot be used even if the same is found to be confessional in nature.

(f) The case of Abdul Razak Murtaza Dafadar v. State of Maharashtra, reported in AIR 1970 SC 283 is the case cited on behalf of the accused on the question of evidentiary value of dog tracking and the learned counsel Mr.D.M.Shah has invited our attention to the observations made by the Supreme Court to the effect that the tracker dog's evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood test and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight. However, we find that

in para 12 of this judgment, the Supreme Court has observed as under:-

"12. In the present case it is not, however, necessary for us to express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the appellant. We shall assume in favour of the appellant that the evidence of P.W.72 and of the panchas with regard to the identification of appellant by the tracker dog is not admissible. Even on that assumption we are of opinion that the rest of the prosecution evidence namely the confession of the appellant Ex.130 and the discovery of the spanner conclusively proves the charges of which the appellant has been convicted."

In this case the Supreme Court has also considered the confession made by the accused. It has been found that after questioning, the accused was sent back to jail and the confession was recorded on the next day, while the accused spent 4 days in judicial custody and he was not under influence of investigating agency for at least 4 days. The Supreme Court held that the confession was voluntary and it was clear that he had spent 4 days in judicial custody and even if he was produced before the Magistrate, he had 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one it would be used against him.

(g) In the case of Surinder Pal Jain v. Delhi Administration, reported in AIR 1993 SC 1723, the Court was concerned with the case of wife's murder by her husband. In the facts of this case, the accused had slept in the verandah near the cot where the dead body of his wife was found, and he had locked the collapsible door with the recovered lock before going to sleep and had himself been close to the dead body before the police came. Thus the picking up of the smell by the dogs of police and pointing towards the accused could not be said to be circumstance which could exclude the possibility of guilt of any person other than that of the accused or be compatible only with hypothesis of guilt of the accused. The pointing out by the dogs could as well lead to a misguided suspicion that the accused had committed the crime. The Court also considered the explanation of the accused regarding the injuries on his person as having been caused by the police and the explanation was found to be quite plausible because according to the father of the deceased, the sister of the deceased, when the tenants of the house and other neighbours had reached the spot,

the appellant was wearing only a vest and the pyjama and no shirt and there were no marks of injuries on his body before he was taken to the police station. The prosecution case regarding the presence of injuries on the person of the deceased was also found to be quite doubtful. In such circumstances, the Supreme Court agreed with the learned Sessions Judge that the prosecution has not established the case against the appellant beyond reasonable doubt.

Such is not the position in the present case. In the case under consideration before us, the sniffer dog of the dog squad was first taken to the scene of the offence and was then let free. The evidence is that he first went to the house of the deceased, then to the house of the accused and, thereafter, jumped thrice over the accused while he was standing in a group of persons.

(h) In the case of *Rahim Beg v. The State of U.P.*, reported in AIR 1973 SC 343, the Supreme Court was concerned with the case of a rape alleged to have been committed by a fully developed man on a girl of 10 to 12 years. It was alleged that 2 persons had committed rape upon her. As per Doctor, who conducted the post mortem, contusions were found on both sides of her face, neck, chest and the arms. Abrasions were also found on both her legs as well as on the neck. There was half inch long vertical tear which started from the lower portion of the junction of labia majora. Clotted blood was present on the margin while blood was found in the vagina. Hymen and vagina were found to be torn. Subcutaneous tissue of the neck portion was congested. Brain and membranes too were congested. Likewise, there was congestion in the larynx and the lungs. Hyoid bone was fractured. FORTHY blood mucus was found in the lungs. Death, in the opinion of the doctor, was due to asphyxia as a result of pressing of the neck and blockade in the passage of the mouth. The vaginal injuries were the result of rape. In para 18 of the judgment, the Court considered the evidence regarding extra judicial confession of the 2 accused, which had been made by them to Mohd. Nasim Khan (P.W.4) and the recovery of the ornaments belonging to the deceased from the two accused, on which the conviction was based. The confession was made to one Mohd. Nasim Khan and the court found that according to the said witness, the 2 accused came to him at his house and told him that they had raped and killed the daughter of Ramjas by strangulating her and they also stated about the removal of her ornaments. The court considered that said Mohd. Nasim Khan belongs to some another village, there was no history of previous association between the

witness and the 2 accused as may justify the inference that the accused could repose confidence in him. The Court found it highly improbable that the 2 accused would go to Mohd. Nasim Khan and blurt out a confession. The Court considered the circumstance that the two accused persons could not have tried to run away on seeing the police party coming with Mohd. Nasim Khan if Mohd. Nasim Khan had gone to the police at their request. In this case offence of rape and murder was committed on 3.8.69. The 2 accused had been arrested on the morning of 4.8.69 and their medical examination was held on 5.8.69. The Court considered the evidence of the Medical Officer of District Jail, Rae Bareilly, Dr. Katiyar, who deposed that if a girl of 10 or 12 years, who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. But no injury was found by the Doctor on the male organ of any of the two accused and the absence of such injuries on the male organs of the accused would thus point to their innocence. The Supreme Court found that no cogent explanation has been furnished as to why they were not got medically examined soon after they are arrested by police. In the facts of this case, the Court found that the accused persons could not have made the extra judicial confession to a person with whom they had no previous association and the accused could not have reposed confidence in him. In the facts of the present case, extra judicial confession was not found to be natural and believable and in the facts of this case, the absence of injuries on the male organs of the 2 accused persons were also taken to be a pointer towards their innocence.

In the case before us, the extra judicial confession has been made before the Doctor and there is no reason to disbelieve the Doctor P.W.2, who had recorded the say of the accused in his medico legal certificate on the same date on which he was examined i.e. on 9.1.99. The accused was arrested on 8.1.99 in the afternoon and was subjected to medical examination on the next day i.e.. 9.1.99 while the incident had taken place on 5.1.99 and, therefore, in the facts of this case, mere absence of injuries, cannot absolve the criminal liability of the accused. Moreover, the injury, which has been noted by Doctor in the post mortem notes shows that there was a tear right from vagina to anus by some sharp edged weapon in Exh.10. This injury was in fact in the nature of episiotomy (incision of perineum) and after episiotomy even if a minor girl is subjected to rape by a fully developed man, he may not sustain any such injury or injuries on his male organ which may be

visible or capable of being noticed even after four days.

(i) In the case of *State of Gujarat v. Mohanlal @ Munno Usmanbhai Chauhan*, reported in 1996 (1) GLH 919, accused, aged 25 years, had committed rape on a minor girl of 11 years and no injury was found on the private part of the accused. There was only swelling in the male organ of the accused and the same was found to be not sufficient to draw inference against the accused. The Court considered that victim had not disclosed to the Doctor as to how her private parts had been injured, she also did not disclose about abrasions or bruises on her back and she suppressed the wrong done by the accused and the incident was suppressed for no good cause by the victim as well as mother at the initial stage and the FIR was filed after two days, the Court did not rely on the evidence of such witnesses in want of independent corroboration and relying upon the case of *Rahim Beg v. State of U.P.* (Supra) found the acquittal to be in order.

In our opinion, this case has no relevance with the present case except on the question of absence of injury on the part of male organ of the accused. The absence of such injuries on the male organ of the accused in the present case stands explained as stated above in para (h).

(j) The case of *Jaharlal Das v. State of Orissa*, reported in AIR 1991 SC 1388, was a case of rape and murder based on circumstantial evidence and the Supreme Court did not believe the case of the prosecution that accused and deceased were last seen together as the same was not proved beyond doubt and the recovery of the dead body at the instance of the accused was also not proved and the medical witness on examination of the accused has stated that there was no intercourse within one hour of his examination.

23. The cases cited on behalf of the State by the learned P.P. are dealt with as under:-

(a) In *State v. Ammini*, AIR 1988 Kerala 1, a Full Bench of Kerala High Court considered the statement made by accused to a Doctor of Government Hospital. Such statement although incriminating, was found to be admissible in evidence and it was held that it was not hit by S.26. In para 44 of this judgment, the statements given by 3rd and 4th accused to Doctors, who examined them after arrest, have been considered. The 3rd accused was arrested on 2.7.80 and after interrogation he was taken to Doctor attached to Government Hospital. The

Doctor noticed 3 wounds on the right fingers of 3rd accused, all the 3 wounds were found infected. When the Doctor asked the 3rd accused as to how he sustained the injuries, the reply given by the 3rd accused was recorded by Doctor in Ext.P.22 wound certificate in the following words:-

"These small injuries were caused by biting when I closed Merly's mouth to silence her at 7.30 p.m. on Monday before last."

Similarly the 4th accused was arrested on 5.7.80 and he was taken to Doctor attached to Government Hospital and the Doctor noticed 2 healing scars. The 4th accused told the Doctor that, "my left elbow and the outer part of the right hand were injured while taking Merly to the kitchen, holding her from behind with left hand, inside Merly's house at about 7.30 p.m. on Monday, 26-3-1980". This statement was recorded by Dr.P.W.64 in Ext.P36 wound certificate. The said items of evidence were attacked on two grounds. Firstly that they are inadmissible in evidence and secondly that the wound certificates have been concocted for this case. The Full Bench made a careful scrutiny. It was observed that admissibility was questioned on the ground that the statements are hit by S.26 of the Evidence Act, which prohibits confession made by a person whilst he was in the custody of a police officer. The Court held that what is prohibited is only 'confession' and the embargo is not extended to the statements which do not amount to confession. Admission can be proved as against the person who makes it, and S.21 of the Evidence Act permits such admissions being proved. The contours of S.21 are not bounded by limitations of the person being in the custody of a police officer. There is no doubt that if the admission amounts to 'confession' it transgresses into the forbidden field designed in S.26. Neither the Evidence Act nor other statutes on criminal law defines confession. Reference was made to a decision of Lord Atkin in the case of Narayana Swami v. Emperor, reported in AIR 1939 PC 47 and observations of Lord Atkin have been quoted as under:-

"The words 'confession' as used in Evidence Act cannot be construed as meaning a statement by an accused 'suggesting the inference that he committed' the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is

not of itself a confession".

It has also been noted by Full Bench of Kerala High Court in this case that the Supreme Court had adopted the aforesaid explanation as correct in *Palvinder Kaur v. State of Punjab*, reported in AIR 1952 SC 354. In *Aghnoo Nagesia v. State of Bihar*, reported in AIR 1966 SC 119, the Supreme Court considered the question of severability of the accused's confession while in custody; one exculpatory and the other inculpatory. In the context Supreme Court found it worthwhile to adopt the same line of thinking about the contours of confession and the principles followed in *Palvinder Kaur's* case were reaffirmed. The important decision on this subject, in view of the context in this case, is *Kanda Padayachi v. State of Tamil Nadu*, reported in AIR 1972 SC 66. The subject dealt with in that decision is the admissibility of a statement made by an accused, in police custody, to a doctor regarding some minor injuries found on his person, to the effect that, "it was the deceased who at about midnight on July 10, 1969 had caused the injury by biting him." The Supreme Court made reference to the case law on the subject including *Pakala Narayana Swami's* case and held that the statement in question did not amount to a confession, but only amounts to an admission of fact, "no doubt of an incriminating fact, and which established the presence of the appellant in the deceased room". In Para 13 of this judgment, the Supreme Court observed as under:-

"It is thus clear that an admission of a fact however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act."

The Full bench of Kerala High Court in this decision has also made reference to the earlier Division Bench decision of Kerala High Court in case of *Cahndran v. State of Kerala*, reported in (1987) 1 Ker LT 391 and observed that the Division Bench followed the same principle. On this basis, the statements of the two accused, as were made in the case to the Government Doctor, were held to be admissible, though they were incriminating statements and it was held that this incriminating statements do not amount to confession and hence they are not hit by S.26 of the Evidence Act.

(b) In the case of *State of A.P. v. Gangula Satya Murthy*, reported in (1997) 1 SCC 272, the Supreme Court

had occasion to consider the provisions of S.24, 25 and 26 of the Indian Evidence Act, in which confession was made by the accused before two witnesses of the locality, which were then reduced to writing inside the police station, when the accused was produced before the Police. The Supreme Court held that such extra judicial confession was not hit by S.26. The Supreme Court held that while it is true that any confession made to a police officer is inadmissible under S.25 of the Act and that ban is further stretched through S.26 to the confession made to any other person also if the confessor was then in police custody, such custody need not necessarily be post arrest custody. The word 'custody' used in S.26 is to be understood in a pragmatic sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of the section. If he makes any confession during that period to any person, be he not a police officer, such confession would also be hedged within the banned contours outlined in S.26 of the Evidence Act. However, in the case before the Supreme Court, the confession made by the accused was not made while he was anywhere near the precincts of the police station or during the surveillance of the police and, therefore, the mere fact that the confession spoken to those witnesses was later put in black and white is no reason to cover it with the wrapper of inadmissibility.

(c) In the case of *Dhananjoy Chatterjee v. State of W.B.*, reported in (1994) 2 SCC 220, the Court was concerned with the case of rape and murder of a young girl of 18 years by security guard of the building. In this case the circumstances relied upon by the prosecution include recovery of button and broken chain of accused from the place of occurrence alongwith seizure of shirt and pant of accused. It was a case based on circumstantial evidence.

24. It has also been submitted by the learned P.P. Mr.P.G.Desai that in this case, the offence is proved on the basis of circumstantial evidence right from the point of time when the accused was seen in the company of the deceased Ramila, by P.W.4 Kalidas, he was also seen going towards the house of Mahijibhai - the father of the deceased girl by P.W.7, was also moving in the locality knocking at doors of the neighbours to satisfy his sexual urge and making indecent proposal to Manishben, aged 14 years old girl, P.W.6, and when he prevented the witness P.W.8 Maganbhai from going towards the Nali while the

accused was coming from the side of Nali at 11.0 P.M. on the date of incident. He has also submitted that the evidence of the dog tracking has gone against the accused and the examination of the articles, which were recovered from the spot and at the instance of the accused from his house, and the examination of the same by Forensic Science Laboratory and the presence of saliva on the bud of the bidi with Group 'B', blood group of accused being 'B-Rh positive', resemblance of the button from the spot and the buttons of the shirt of the accused go a long way to prove the commission of the offence by the accused and none else. The extra judicial confession before P.W.2 and the fact that the accused did not co-operate before this Doctor in giving the sample of semen for the purpose of investigation and to compare it with the result of the vaginal swab and vaginal smear, clearly prove that none else but the accused is the offender in this case. The beastly manner in which the heinous offence has been committed with cruelty against the female child of about 5 years old living in his own neighbourhood certainly warrants a punishment not short of death sentence.

25. As a result of the study and the analysis of the various cases, which have been cited, the following principles are clearly discernible:-

A- In absence of direct evidence and no eye witness
i.e. cases based on circumstantial evidence only:-

(a) The circumstances from which the conclusion of guilt is to be drawn should be fully proved and these circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond reasonable doubt and the established circumstances should be consistent with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

(b) The Court has to be on its guard to avoid the danger of allowing suspicion to take place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however, strong they may be, to take place of proof.

(c) The chain of circumstances would snap if the main link goes and the other circumstances do not establish the guilt beyond reasonable doubt.

(d) For a definite conclusion, 'may be true' should

not be allowed to take place of 'must be true'.

B- Extra Judicial Confessions and admissions.

- (a) A statement, which is confessional in nature, if sought to be relied upon against the maker in a criminal trial, the same has to be true as well as voluntary.
- (b) An extra judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution.
- (c) Where an extra judicial confession is surrounded by suspicious circumstances its credibility becomes doubtful and it loses its importance.
- (d) The Courts generally look for independent reliable corroboration before placing any reliance upon an extra judicial confession.
- (e) Any confession made to a police officer is inadmissible under S.25 of the Indian Evidence Act and this bar is further stretched through S.26 to the confession made to any other person also if the confession is made in police custody.
- (f) Such "custody" need not necessarily be post arrest custody. The word 'custody' used in S.26 is to be understood in a pragmatic sense. If any accused is within the ken of surveillance of the police during which his movements are restricted then it can be regarded as custodial surveillance for the purpose of this Section. If he makes any confession during that period to any person, be he not a police officer, such confession would also be hedged within the banned contours outlined in Section 26 of the Evidence Act.
- (g) A distinction has to be made between a statement, which does not amount to confession as against admission. Admission can be proved as against the person who makes it and S.21 of the Evidence Act permits such admissions being proved. The contours of S.21 are not bounded by limitations of the person being in the custody of a police officer. However, the admission should not transgress its limits so as to become a confession within the meaning of S.26 of the Evidence Act.
- (h) A confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence.

- (i) An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession.
- (j) Confession cannot be construed as meaning a statement by an accused suggesting the inference that he committed the crime.
- (k) Admission of a fact however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act.

C. On the question of tracking dog's evidence:-

- (a) The comparison of tracking dog's evidence with the type of evidence of scientific expert describing chemical reactions, blood tests and the absence of bacilli, does not appear to be sound. Behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. Therefore, in the present state of scientific knowledge, evidence of dog tracking, even if admissible, is not ordinarily of much weight.
- (b) Even if it is found that tracking dog's evidence is not admissible, if there is other evidence proving the involvement of the accused in the commission of the offence, including the admission of certain facts by the accused, compatible with the hypothesis that accused was guilty, the same can be used.

26. We have examined the evidence available in this case on the basis of the above principles formulated on the strength of the judicial opinion expressed by the Courts and our findings are as under:-

- (a) On the question of accused being last seen in the company of the deceased, P.W.4 Kalidas cannot be believed and, therefore, this circumstance is not proved against the accused. The evidence of P.W.8 is of course suggestive that perhaps the accused could be the last person with the

deceased and it also goes against the accused that he prevented the witness in search of 'Ramila' to go towards Nali.

(b) The factum of borrowing the cycle from P.W.7 Ishwarbhai on the evening of the date of the incident and returning of the same by the accused to the witness after the starting of the T.V.serial also does not go against the accused because it was not only on that day but in past also the accused had been borrowing the cycle and returning the same to this witness on many occasions. The say of this witness that after returning the cycle the accused went towards the house of Mahijibhai, does not lead to the conclusion that the accused was last seen in the company of the deceased. Accused lives in the same colony and the house of the accused as well as that of Mahijibhai are in the same row and, therefore, if the witness says that he went towards the house of Mahijibhai, it can not lead to any definite or irresistible conclusion that he is the person, who was last seen in the company of the deceased. Thus, the say of this witness only raises a lurking doubt.

(c) The say of P.W.6 Manishaben that the accused had gone to her house sometime before the incident, called her mother and when she came out he made an offer of 50 Rupees for her work while she was in her house with her parents, brother and sister, does not sound very natural, as a person living in the same locality would not dare to do so in normal course, more particularly when this witness has not given any such past history, not even single instance about the accused coming to her house. Even if it is assumed that what she has stated must have happened, because some times a person may do a stupid act also and we do not know how the human mind works in a given situation, all that can be inferred from the evidence of this witness P.W.6 is that accused was actuated with sexual urge at that time, but that by itself cannot be taken to be any evidence for the purpose of proving the case of accused being last seen in the company of the deceased.

(d) We also do not find it safe to rely upon the tracking dog's evidence, particularly when the actual dog handler Ganpatsinh Chauhan has not been examined nor any other person, who was

expert of the dog squad, has been examined, although the presence of such experts and the dog handler at the time of dog tracking is admitted by the Investigating Officer P.W.13 Madhavsinh himself, who has stated that he had procured the presence of the team of the dog squad and that the expert of the dog tracking and the dog handler Ganpatsinh Chauhan was present at the time when the dog tracking was conducted. Jumping of the sniffer dog thrice over the accused, as stated by more than one witnesses, and the denial of the suggestion by the witnesses that the dog had not jumped on the other persons, namely, Punambhai Vaghabhai and Chhaganbhai Mangalbhai and the dog had only smelled these two persons and did not do anything else to them, may have given basis to the prosecution to apprehend the accused but it could also be misguided and, therefore, the result of the dog tracking does not lead to an irresistible conclusion against the accused that he is the culprit. The evidence in this regard also suffers from the infirmity which remains unexplained inasmuch as P.W.10 Ranchhodbhai has stated that he was called to be a panch witness in the morning at 9.0 to 9.30 A.M. on 8.1.99 and at the place of the offence sniffer dog was made to smell the chaddy and pant whereas the pant was recovered at the instance of the accused under S.27 only after the result of the dog tracking i.e. in the afternoon at 3.30 P.O. as stated by P.W.11 Chhaganbhai.

(e) So far as the result of the examination of the articles by Scientific Officer of Forensic Science Laboratory is concerned, the bud of bidi with saliva of Group 'B' and the button found from the place of offence, which has been found to be resembling with the other buttons on the shirt of the accused, proves the presence of the accused appellant at the place of offence and the presence of blood mixed with semen in the vaginal swab and vaginal smear show that the offence of rape had been committed.

(f) The evidence of P.W.1 and the post mortem note Exh.10 proved that offence had taken place.

The deposition of P.W.2 Dr.D.R.Khadayate show that the accused did not co-operate in ejaculating the semen and that he had admitted the fact of taking Ramila to Nali, biting on her face pressed her mouth, laid her in the

missionary position and tried sex with her for half an hour and went back to his house and gone to sleep when he felt that she was dead. Admission of these facts by the accused before this witness P.W.2 corroborates the case of the prosecution against the accused and affords a very strong basis to be relied upon so as to establish the guilt of the accused in the commission of the offences for which he has been convicted and it also finds due corroboration from the resemblance of the button which was found from the scene of the offence with 3 buttons of the shirt of the accused. The button has been found to be resembling in colour, size, and number of holes and the blood Group of the accused i.e. B-Rh Positive has also been found to be the same as that was present on the saliva of the smoked bud of the bidi, which has been found to be of Group 'B'. In these circumstances, even if the other evidence, which has been brought on record, including the evidence of the dog tracking is ignored, there is sufficient evidence so as to prove the involvement of the accused in the commission of these offences.

(g) It is also a fact that the prosecution did not examine the following witnesses:-

- (i) Madhuben, wife of P.W.3 Mahijibhai i.e. the mother of the deceased, who was present alongwith Mahijibhai so as to watch the T.V.serial at the house of Kalidas.
- (ii) Ichhaben too was present watching the T.V.serial at the house of Kalidas, as has been stated by P.W.3 Mahijibhai.
- (iii) Popat and Fatehsinh Thakor, who met P.W.5 Muljibhai and informed him in the afternoon of 6.1.99 that dead body of deceased was lying ahead when both of them met the witness P.W.5 while he was on his way to the field.
- (iv) Bhikhabhai Mangalbhai, who had met P.W.8 Maganhai while he was on search of Ramila on the night of 5.1.99, just before this witness met the accused when the accused was coming from the side of the Nali i.e. the place of the offence, has also not been examined.

(v) Ganpatsinh Chauhan, dog handler, who was present at the time of dog tracking.

However, we find that the non examination of these witnesses is not fatal to the case of prosecution in view of the other evidence. It would have been better had these witnesses been also examined. We may also observe that the prosecution could have also gone for D.N.A. Test on the basis of blood mixed with semen in the vaginal swab and vaginal smear and the investigation could be still more scientific on more than one aspects - but the case of the prosecution is not liable to be rejected on this ground - when there is sufficient evidence otherwise to believe the case of prosecution as discussed above.

27. As a result, we find that the accused is the person, involved in the commission of these offences, and he has been rightly convicted by the trial court for the offences punishable under Sections 363, 376(2)(F), 451 and 302 of the I.P.C. and, therefore, so far as the question of conviction is concerned, the same is hereby sustained and to that extent the Appeal filed by the accused challenging the conviction fails.

28. Now comes the question with regard to the sentence and the question of confirmation of death sentence. In this regard, following cases have been cited before us:-

Cases in which death sentence confirmed:

(i) Mahendra Nath Das v. State of Assam, reported in (1999)5 SCC 102.

Offence under S.302 I.P.C. Hand of the deceased amputated in the market and he was beheaded. Accused carried the blood dripping head to the Police outpost through road, carrying the head in one hand and the sword in the other hand. A case of depicting the extreme depravity. The accused a man of 33 years having three unmarried sisters and aged parents and his case was that he was not well at that time.

Death sentence awarded by the trial court confirmed upto Supreme Court.

(ii) (1994)4 SCC 478, Shankar v. State of T.N.

Offence under S.302 I.P.C. The accused was found to be a hardened criminal and a menace to the society.

Death sentence confirmed upto Supreme Court.

(iii) (1998)4 SCC 531, Govindaswami v. State of T.N.

The Supreme Court came to the conclusion that declining to confirm the death sentence would be yielding to misplaced sympathy.

Death sentence confirmed upto Supreme Court.

(iv) State v. Nalini, reported in (1999)5 SCC 253.

The case of assassination of Rajiv Gandhi. Originally 26 accused in all, out of which in case of 7 accused persons, including Nalini, the conviction for offences punishable under S. 120B read with S.302 I.P.C. was confirmed and in case of 4 including Nalini out of this 7, death sentence was confirmed and in case of remaining 3 it was altered to imprisonment for life. The remaining accused persons were acquitted.

Shri Rajiv Gandhi and 18 other persons died and 43 persons were seriously injured, which include Police Officers and innocent persons.

It has been observed by the Supreme Court that-While in Office of Prime Minister of India, Shri Rajiv Gandhi, to bring about a settlement of disputes between Tamil speaking ethnic minority and Government of Sri Lanka, signed the Indo-Sri Lankan Accord on 22.7.87 under which the Government of India took upon itself certain role. The LTTE (Liberation Tigers of Tamil Eelam) was among the signatories to that Accord. In discharge of its obligation under the Accord, the Government of India sent the Indian Peace Keeping Force (IPKF) to Sri Lanka to disarm LTTE. This fact together with the alleged atrocities of IPKF against Tamilians in Sri Lanka and non-cooperation of Government of India with LTTE, at what is termed as the hour of their need, gave rise to grouse which culminated in plotting of a conspiracy to assassinate Shri Rajiv Gandhi, which was put through on the fateful date i.e. on 21.5.91.

According to Hon'ble Justice Wadhwa (para 636) a former Prime Minister of the country was targeted because this country had entered an agreement with a foreign country in exercise of its sovereign powers. Rajiv Gandhi being the head of the Government at that time was signatory to the Accord which was also signed by the head of the Government of Sri Lanka. The Accord had the approval of Parliament. It was not that Rajiv Gandhi has entered into the Accord in his personal capacity or for

his own benefit. Though it was held that object of the conspiracy was not to commit any terrorist act or any disruptive activity, nevertheless murder of a former Prime Minister for what he did in the interest of the country, was an act of exceptional depravity on the part of the accused, an unparalleled act in the annals of crimes committed in this country. In a mindless fashion not only was Rajiv Gandhi killed but along with him others died and many suffered grievous and simple injuries. No mitigating circumstance was found to upset the award of sentence of death and in case of Nalini alongwith three others, it was found that they deserve extreme penalty and the death sentence was confirmed.

The facts of the case were found to be uncommon. A crime committed on Indian soil against the popular national leader, a former Prime Minister of India, for a political decision taken by him in his capacity as the head of the executive and which met with the approval of Parliament, by persons running political organisation in a foreign country and their agents in concert with some Indians for the reason that it did not suit their political objectives and of their organisation, cannot but be a 'rarest of rare' case. In such a case the part played by Nalini was found to be a candid participation in the crime of conspiracy to assassinate Shri Rajiv Gandhi who was himself a young and popular leader so much loved and respected by his fellow citizens and had been the Prime Minister of India. The conspirators including Nalini had nothing personal against him but he was targeted for the political decision taken by him as the Prime Minister of India. She inspite of being an Indian citizen joined the gang of conspirators and engaged herself in pursuit of common intention to commit the crime only because she was infatuated by the love and affection developed for Murugan, and thus played her part in the execution of the conspiracy which resulted in the assassination of Shri Rajiv Gandhi and death of many police officers and innocent citizens including a small girl. For a person like Nalini, it was observed by Justice Quadri (para 724) that taking into consideration all the mitigating circumstances, there was no room for any leniency, kindness and beneficence.

Death sentence confirmed.

However Justice Thomas gave dissenting judgment on the question of death sentence against Nalini. According to Hon'ble Justice Thomas, in the normal spectrum of consideration, death penalty is the first priority to be chosen for her. It was noted that she was an elderly and educated woman, she was persistently

brainwashed by Murugan, who became her husband and then the father of a child. On the basis of her confession, the court gathered the impression that she was led into the conspiracy by playing on her feminine sentiments, she became an obedient participant without doing any dominating role. By indoctrinative exercises she would have honestly believed in the virtue of offering her help to the task undertaken by the conspirators. In the confessional statement made by her brother Bhagyanathan, another co-accused, it was revealed that Nalini had confided to him on 23.5.91 (i.e. after 2 days after the offence) itself that as a matter of fact she realised only at Sriperumbudur that Dhanu was going to kill Rajiv Gandhi. Hon'ble Justice Thomas considered the fact that she belongs to the weaker sex and her helplessness in escaping from the cobweb of Sivarasan and company, the mere fact that she became obedient to all the instructions of Sivarasan need not be used for treating her conduct as amounting to 'rarest of the rare cases' indicated in Bachan Singh's case. Yet another consideration which was found to be difficult to overlook by Hon'ble Justice Thomas was that she was the mother of a little female child who would not have even experienced maternal huddling as that little one was born in captivity. Ofcourse the maxim 'justitia non novit patrem nec matrem' (justice knows no father nor mother) is a pristine doctrine. But it cannot be allowed to reign with its rigour in the sphere of sentence determination. It was also noticed that death sentence had been confirmed on the father of the small child and, therefore, an effort to save its mother from the gallows may not militate against jus gladii so that an innocent child can be saved from imposed orphanhood.

Death sentence passed on her was altered to one of imprisonment for life by Hon'ble Justice K.T.Thomas.

However, the death sentence was confirmed against her by majority decision (Coram: Hon'ble Justice D.P.Wadhwa and S.S.M.Quadri, JJ with the dissent of Hon'ble Justice K.T.Thomas).

(v) In case of Kehar Singh v. State (Delhi Admn.), reported in (1988) 3 SCC 609.

The case of assassination of Smt. Indira Gandhi. In this case the security guards of Smt.Indira Gandhi, the then Prime Minister of India, assassinated her. The Supreme Court classified it as a 'rarest of rare case', inter alia, on the ground that the convicts were involved in assassinating a great daughter of India and the Prime Minister of India and that the act of the accused not

only took away the life of the popular leader but also undermined our democratic system which had been working so well for the last 40 years.

The death sentence of Satwant Singh who actually committed the murder as well as that of Kehar Singh who conspired and inspired for commission of the crime, was confirmed.

The principles laid down by the Supreme Court in the case of Bachan Singh v. State of Punjab, reported in (1980) 2 SCC 684 and in the case of Machhi Singh v. State of Punjab, reported in (1983) 3 SCC 470 were applied.

(vi) Jai Kumar v. State of M.P., reported in AIR 1999 SC 1860.

It was a case of offence under S.302 I.P.C. The accused was charged under S.302 read with S.201 I.P.C. of committing murder of his sister in law (brother's wife, carrying pregnancy of 22 to 30 weeks), aged 30 years and her minor daughter (niece of the accused) aged 8 years. The age of the accused was 22 years. It was found to be not relevant. It was found to be an established case of depravity and criminality of the accused in no uncertain terms. The evidence, which was considered, was that the accused entered the house and bolted from outside the mother's room and, thereafter, removed certain bricks from the wall and 'choukat', thus facilitating the entry into the room where the deceased sister in law was sleeping with the child. The accused committed the murder of his sister in law by axe blows on her neck severing her head from the body and taking away her 8 years old daughter and killing her in a jungle by axe blows said to be by offering sacrifice to Mahuva Maharaj and burying her in the sand covered with stones. Thereafter, the accused came back home and carried the body of the deceased sister in law tied in a cloth to the jungle and hung the head being tied on a branch with the hairs and put the body, on the trunk of the tree. The mother herself has appeared as a witness and she stated in no uncertain terms that there was an attempt to commit rape on the sister in law. The evidence of the mother, who watched the incident from the crevices of the window was accepted as material evidence, who had also spoken about the bad character and reputation of the accused in the locality. It was found to be a 'rarest of rare case' in which there were no extenuating or mitigating circumstances and the death sentence was confirmed.

(vii) Dhananjay Chatterjee v. State of W.B., reported in (1994) 2 SCC 220.

The case of rape and murder of a young girl of 18

years by a security guard in the building. The case based on circumstantial evidence. Death sentence imposed by the trial court and confirmed by the High Court was confirmed, as no extenuating or mitigating circumstance whatsoever was found in this case.

(viii) Laxman Naik v. State of Orissa, reported in (1994) 3 SCC 381.

A case of rape and murder of 7 years old girl by her own uncle. No mitigating circumstance found; on the contrary the facts disclosed only aggravated the circumstances against the accused inasmuch as the accused was the uncle of the 7 years old girl, who must have reposed complete confidence in him and acted upon the command of the accused in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the accused. The victim was totally helpless child, there being no one to protect her in the desert where she was taken by the accused misusing her confidence to fulfil his lust. It was a case of circumstantial evidence of last seen together, misrepresentation and intentional false statement of the accused as to the whereabouts of the deceased, evidence relating to injuries on deceased and discovery and seizure of incriminating articles, serious bleeding injury in the private part of the deceased, her cloths were found smeared with blood, eloquently speaking about the monstrous sexual assault made on her and lastly the presence of blood stained underwear belonging to the appellant near the dead body which was seized and identified as one belonging to the appellant and the chemical and serological examination established the presence of blood on the same. The Court has observed that the accused had acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others and, therefore, with a view to screen the evidence of his crime also put an end to the life of innocent girl.

The case was found to be 'rarest of rare case' and death sentence was confirmed.

(ix) Ravji v. State of Rajasthan, reported in AIR 1996 SC 787.

A case of murder of five persons by accused including his wife, who was in advanced stage of pregnancy, and three minor children and attempt to commit murder of two others. Brutual and heinous murders committed in cool and calculated manner while victims were asleep. The defence of temporary psychic disorder

was not accepted and no justification was found to commute death penalty to imprisonment for life. The accused did not even spare his mother, who tried to prevent him from committing such unpardonable crime. He also attacked his mother with the axe which he had used to kill his wife and minor children and caused injuries on her person with an intention to kill her. Thereafter, he went to one of the neighbour's house and attempted to kill the wife of the neighbour while she was asleep and when the poor old Gulabji came in his way while he tried to flee away, the accused killed him also before the eyes of his wife. The crime was found to have been committed with utmost cruelty and brutality without any provocation, in a calculated manner.

Death sentence was confirmed.

(x) Kamta Tiwari v. State of M.P., reported in AIR 1996 SC 2800.

A case of offence under Sections 302 and 376 I.P.C. The accused committed rape on a 7 years old girl, strangled her to death, threw her body in the well and caused disappearance of evidence. The accused was close to the family of the deceased and she used to call accused as 'uncle'. The accused run a television repairing shop near the saloon. The deceased had gone for hair cut with her father and brother and asked the accused on his shop for some toffees and biscuits. The accused readily responded to her request by taking her to the nearby grocery shop and handed over to her a packet of biscuit as a prelude to his sinister design, which unfolded in her kidnapping, brutal rape and gruesome murder and dumping her dead body in a well. Since the accused was in a position of trust, his culpability assumes the proportion of extreme depravity. The court found it a 'rarest of rare case' and found that the death sentence is desirable.

(xi) Machhi Singh v. State of Punjab, reported in (1983) 3 SCC 470.

In a case of family feud the accused persons committed 17 murders in five incidents occurring in the same night in quick succession in five neighbouring villages, while the victims were asleep in the night. The accused persons had made forcible entry in the respective houses. The eye witnesses had watched the respective incidents.

Death sentence confirmed against 3 of the accused persons.

Cases in which death sentence commuted to life imprisonment:

(i) Sheikh Abdul Hamid v. State of M.P., reported in (1998) 3 SCC 188.

A case of circumstantial evidence in which the accused and his friend had committed murder of his wife and her 2 children. The accused were living in a dhaba with the deceased persons. A report was lodged in the police station by one Qadir Khan that his elder sister Manglibi alongwith her children had disappeared or was not traceable for two and half months and he suspected that accused had either killed or sold them. The dead bodies were exhumed by digging the earth. Both the accused persons were convicted under S.302 read with S.34 I.P.C. and sentenced to death. High Court confirmed the penalty of death sentence against both the accused persons. The Supreme Court did not find it to be a case of 'rarest of rare case' and noticed that the prosecution could not point out that it was a cold blooded murder and that there was nothing on record to show how the murder had taken place. In absence of such evidence, death sentence was commuted to life imprisonment by the Supreme Court as it was found to be a case of absence of special reasons for death sentence.

(ii) Ronny v. State of Maharashtra, reported in (1998) 3 SCC 625 was a case under S.302/34 of I.P.C. in which on determination of facts it was found by the Supreme Court that it was a case of rape, murder and robbery in a cold blooded and pre-planned way; all the three inmates of the house viz. husband, wife and their son aged 17 years were brutally murdered by throttling after committing rape on the lady aged over 45 years and the ornaments and valuables were looted by the three accused persons, one of them being a close relative (nephew). After considering the mitigating and aggravating circumstances, the Supreme Court found from the facts and circumstances of the case that what particular role was played by each of the accused and whose case fell with the rarest of the rare category was not ascertainable and, therefore, the possibility of reform and rehabilitation could not be ruled out. In the facts and circumstances of this case, the sentence of death was reduced to sentence of life imprisonment.

(iii) Raja Ram Yadav v. State of Bihar, reported in (1996) 9 SCC 287 was a case under Sections 302/149 and 436/149 I.P.C. Conviction was based on the sole testimony of a child witness. It was a case of murder of six persons to take revenge and the child witness could not tell the names of four out of eight accused persons.

Although the murder was found to have been committed in a premeditated and calculated manner with extreme cruelty and brutality for which normally sentence of death is wholly justified, but in the special facts of this case, it was not considered proper to award the extreme sentence of death and the death sentence was commuted to the sentence for life imprisonment.

(iv) In the case of *Suresh v. State of U.P.*, reported in AIR 1981 SC 1122, the sole eye witness was a five year old son of the deceased. The deposition of the child witness was held to be convincing and reliable, but it was observed that the extreme sentence cannot seek its main support from the evidence of the child witness and it was not safe enough to act upon such deposition, even if true, for putting out a life.

(v) *State of H.P. v. Manohar Singh Thakur*, reported in (1998)6 SCC 158 was a case of circumstantial evidence under S.302 I.P.C. The trial court had recorded conviction but High Court had acquitted the accused. When the matter came up before the Supreme Court, the Supreme Court restored the conviction as had been recorded by the trial court but on the question of sentence it was not found to be a rarest of rare case so as to warrant death sentence. In this case the accused and deceased were last seen together. The accused had given a false explanation to the wife of the deceased that the deceased had stayed back in the village and the accused was found in possession of the key, which used to remain with the deceased and the dead body of the deceased had also been found in the same direction in which the deceased and the accused were observed as going. Injuries were also found to have been inflicted on the head of the wife of the deceased similar to the injuries found on the dead body of the deceased. Currency notes were also recovered from the accused at the time of his arrest and the weapon of offence and other incriminating articles pursuant to disclosure statement made by the accused were also recovered. Conviction was recorded, but on the question of death sentence, the Supreme Court held that the murder by its very nature was shocking but that per se does not justify death penalty and the death sentence was substituted by imprisonment for life.

(vi) In *Allauddin Mian v. State of Bihar*, reported in AIR 1989 SC 1456, the Supreme Court held that the death sentence is to be reserved for exceptional cases when the criminal is a menace to the society. The Supreme Court found that according to the charge the target was the

father of the deceased and not the two infant daughters who were killed and the killing was not in the contemplation of any of the accused and the infants were the victims of the offenders' ire resulting from frustration at the escape of their target i.e. father. The Supreme Court found that there was nothing so uncommon about the crime as to make the case an exceptional one and the mere fact that infants were killed, without anything more, was not sufficient to bring the case within the category of 'the rarest of rare' cases.

(vii) *Kishori v. State of Delhi*, reported in (1999)1 SCC 148 was a case under Sections 302/149 and 148 I.P.C. and it was relating to Delhi riot following assassination of Prime Minister of India. An attack by mob resulted into death of 3 persons. There was absence of evidence to establish that death was caused only on account of injuries inflicted by the accused. It was also found that the accused was neither the leader of the mob nor he exhorted others to do any particular act. The murder of several persons had taken place in a chain of events occurring on one night and day. It was found to be a case of an act of mob as a result of temporary frenzy and not a case of any organised systematic activity. The Supreme Court found that riotous mob is not expected to follow high ideals and in the circumstances of this case, the death sentence passed by the trial court and confirmed by the High Court was converted into sentence of life imprisonment and it was held that when the act is done as a participant in the mob, it diminishes the responsibility, when such an act was part of collective action unless the same is distinguishable as an act of that particular individual.

29. It has always been a great predicament with the Judges in the Court as and when a choice is to be made between death sentence and life imprisonment. A study of the cases, as aforesaid, and the analysis of various considerations, which have been taken note of by the Courts in such cases, make out that the following principles are to be applied when it comes to the question of considering as to whether the death sentence is to be awarded or life imprisonment only.

- (i) Life imprisonment is the rule and death sentence is an exception.
- (ii) Except in grave cases of extreme culpability, the extreme penalty of death need not be inflicted.

(iii) While considering the circumstances and the manner in which the crime has been committed, the circumstances of the offender should also be considered before opting for death sentence.

(iv) A balancesheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised.

(v) Not only the rights of the criminal but also the rights of the victim of crime and the society at large have to be considered so that a punishment befitting to the crime is imposed so as to reflect public abhorrence of the crime.

(vi) Aggravating factors cannot be ignored but at the same time mitigating circumstances are also to be taken into consideration.

(a) Aggravating circumstances may include a case in which the crime has been committed after previous planning and involve extreme brutality and a case in which the crime involves exceptional depravity.

(b) Mitigating circumstances to be taken into consideration may be as under:-

- That the offence was committed under the influence of extreme mental or emotional disturbance.
- The age of the accused.
- The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society.
- The probability that the accused may be reformed and rehabilitated.
- The accused believed that he was morally justified in committing the offence.
- That the accused acted under the duress and domination of another person.
- That the condition of the accused shows that he was mentally defective and that the said defect impaired his capacity to appreciate the

criminality of his conduct.

- That the accused is not a hardened criminal but the crime is a result of sudden impulsive act making him an insensible criminal.

(vii) Unless the nature of the crime and the circumstances of the offender reflect that the criminal is a menace to the society and sentence of life imprisonment would be altogether inadequate, the Court should ordinarily impose lesser punishment and not extreme punishment of death, which should be reserved for exceptional cases only.

(viii) The measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of victim.

(ix) Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against a criminal. Justice demands that courts would impose a punishment befitting a crime so that the Courts reflect public abhorrence of the crime.

(x) The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

(xi) Courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him, or deterring him and others, or all of these things.

(xii) Death sentence is to be given only in rarest of rare case. To determine as to whether a particular case is a rarest of rare case or not, the answers to the following questions would be helpful.

(a) Is there something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence after according maximum weightage to the

mitigating circumstances, which speak in favour of the offender?

30. Applying the principles, as enunciated above on the basis of various decisions, to the facts of the present case, we find that on the one hand there are aggravating circumstances with regard to the rape and murder of a minor girl of about 5 years of age, who was totally unprotected as also the brutality and the depravity with regard to the manner in which the crime has been committed and on the other hand there are mitigating circumstances that the accused is a boy of 20 years i.e. in the age of adolescence, he is not a hardened criminal with any criminal record in past, his father had already expired, seeming to be ignorant of social and moral values, cannot be said to be a menace to the society, it appears to be a case of impulsive bravado of sex and that he wanted to satisfy his sexual urge on the date of the incident and in the process the murder was also committed. The scope and concept of mitigating factors to determine as to whether the death penalty is warranted or not have to be given a liberal and extensive construction after according maximum weightage to the mitigating circumstances. According to the observations made in Bachan Singh's case (Supra - AIR 1980 SC 898) the Judges should never be blood thirsty, hanging of murderers has never been too good, the Courts have inflicted the extreme penalty with extreme infrequency, that life imprisonment is the rule and death sentence is an exception, a real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality and that ought not to have been done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. As observed by the Supreme Court in the case State v. Nalini (Supra) Hon'ble Quadri, J has expressed that it ill behoves a person to order the death of another, he who gives life alone has the authority to take life, in dispensing justice a Judge is not only discharging a sovereign function but he is also doing a divine function, the most difficult task for a Judge is to choose the punishment of death in preference to the punishment of life imprisonment for he is conscious of the fact that once the life of a person is taken away by a judicial order it cannot be restored by another judicial order of the highest authority in this world and, therefore, having taken upon himself the onerous responsibility of doing justice according to the Constitution and the laws, the Judge must become independent of his conviction and ideology to maintain the balance of scales of justice.

In the case of Suresh v. State of U.P., (AIR 1981 SC 1122) the Supreme Court had altered the death sentence to life imprisonment in the case of a boy of 21 years of age when the conviction was based on the testimony of a sole eye witness of 5 years old child and observed as under:-

"Extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life."

31. In the case at hand, as recorded above, we have upheld conviction of the present appellant solely on the basis of the circumstantial evidence with corroboration of button and saliva on bidi bud etc. coupled with his own say before P.W.2 Dr. Khadayate and we do not find it safe in the facts and circumstances of this case to confirm the extreme penalty of death sentence. It cannot be said in the facts of this case that there is some such thing which can be said to be so uncommon about the crime so as to render the sentence of imprisonment for life to be inadequate and that it is a case which calls for death sentence. Similarly giving maximum weightage to the mitigating circumstances also, it cannot be said in the facts of the present case that circumstances of the crime in this case leave no alternative but to impose the death sentence. Therefore, we do not find this case to be that rarest of rare case in which the alternative of the punishment of life imprisonment is unquestionably foreclosed. Appellant, who is a young boy of 20 years, has a long way to go and since he is not a hardened criminal and has not precipitated any crime in past and has not exhibited any criminality in his behaviour prior to the commission of this offence, the probability that he can be reformed and rehabilitated cannot be ruled out. On consideration of the circumstances of this case in totality, the evidence on which we have upheld the conviction and the consideration of the aggravating circumstances and the mitigating circumstances, the balance certainly tilts in favour of opting for the penalty of life imprisonment.

32. The upshot of the aforesaid adjudication is that the death sentence, as has been awarded to the present appellant, is not confirmed and the penalty of death sentence awarded to the appellant is altered and commuted to that of life imprisonment. The reference with regard to confirmation of death sentence is answered accordingly and the Appeal against the conviction fails. Whereas the appellant is sentenced to life imprisonment, the sentence of death, as ordered by the trial court, is set aside and

to that limited extent the Appeal is allowed and the slight modification is also made in the order of the trial court with regard to the set off given by the trial court under Section 428 Cr.P.C. for the period for which the accused - appellant remained in Jail during trial and it is ordered that the appellant shall not be entitled to such set off for the period during which he remained in jail during the course of trial under S.428 of the Cr.P.C. because it is a case of sentence of life imprisonment to the appellant and in case of life imprisonment such set off is not to be given.

(M.R.Callan,J)

(R.R.Tripathi,J)